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EARLY COURTS OF PENNSYLVANIA.

Lloyd, William Henry

THE EARLY COURTS OF PENNSYLVANIA

BY .

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UNIVERSITY OF PENNSYLVANIA
LAW SCHOOL SERIES

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EACH volume in this series has been made a publication of the School of Law of the University of Pennsylvania, by a vote of the Law Faculty. The authors are connected with the school as members of the teaching force, fellows, or graduate students.

The object of the University is to promote the scientific study of legal problems—historical and practical, and to assist in the improvement of the law.

"Yes, you have shown us a representation of freedom. True. But you are content with it in a world that moves by computation some considerable sum upward of sixty thousand miles an hour."

DR. JULIUS VON KARSTEG TO HARRY RICHMOND

PREFACE.

This account of the early courts of Pennsylvania is the outcome of some lectures delivered as an auxiliary course in the Law School of the University of Pennsylvania. Their purpose was to describe briefly the establishment and development of the courts in the colonial period. That our ancestors should have expressed such profound admiration for the common law while deviating so widely from it in practice, must have puzzled many who have not learned to put a true value upon the flights of forensic oratory. History alone supplies the key, and colonial legal history has not received the attention it deserves. The absence of reports, the destruction of many records and the inaccessibility of those that have been preserved, have all contributed to discourage work in a field usually abandoned to the antiquarian. But as American law increases in importance, the story of its obscure beginnings will require careful consideration.

The earliest emigrants, caring little for the common law except those principles associated with Magna Charta, stamped their peculiar notions upon our jurisprudence in a way that the second and more conservative generation of colonists was unable to eradicate. The Revolution, and the constitutional development that followed, concentrated attention on public rather than on private law, which in many of the States has been allowed to develop haphazard, along the lines of least resistance. Before it will be possible to classify and discuss American colonial law in a thorough and scientific manner, much preliminary work must be done in local fields, and, from material so collected, there may be derived finally a rational account of our legal institutions.

It is in this spirit that the following study has been prepared. The original lectures were undertaken, at the suggestion of Dr. William Draper Lewis, Dean of the Law School, and material sought in the records without, at first, a sufficient realization of their lack of coherence. It was found that while some special topics had been carefully discussed, and while others were treated incidentally, in works having a different object in view, there was no concise

statement of the origin and growth of the courts and their jurisdiction based directly on the statutes and archives of the commonwealth. Such a narrative, it was thought, might prove useful to those who have not found time to become acquainted with the scattered literature of the period described. The treatment is not exhaustive; that would be impossible in a volume of this size, but it is believed that the information contained will be found accurate, as it is based on a careful examination of the public records. While the labor involved was greater than anticipated, the result by no means does justice to a deeply interesting topic.

WILLIAM H. LOYD.

BIDDLE LAW LIBRARY, May 10, 1910.

NOTE.

The work cited as Charter and Laws of Pennsylvania contains the Duke of York's Laws and the Acts of Assembly prior to 1700. The Statutes at Large of Pennsylvania, as published to date, begin at 1700 with Volume II and end at 1793 with Volume XIV. Compilations of the laws of the State by Dallas and Smith are also cited for acts in the last years of the eighteenth and early years of the nineteenth centuries. The regular series of Acts of Assembly which begin with 1800 are cited, according to local custom, as pamphlet laws, abbreviated "P. L." The records of the court at Upland were published by the Historical Society of Pennsylvania in 1860; the records of the court at New Castle by the Colonial Society of Pennsylvania in 1904. This society is about to publish the records of the courts of Chester County which, unfortunately, are not yet available for reference. For the convenience of the general reader, illustrations have been taken from published records, when practicable, rather than from manuscript sources. The dates are given just as they appear in the records without accounting for the discrepancies due to the reform of the calendar in 1752.

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THE EARLY COURTS OF PENNSYLVANIA.

CHAPTER I.

For more than two hundred years the courts of province and state have administered justice to the inhabitants of Pennsylvania. Created under the peculiar conditions surrounding the foundation of the colony, subjected to numerous legislative experiments, their organization and practice present many peculiarities that can only be understood by a reference to their history. This history has been sadly neglected owing partly to the paucity of material, and partly to lack of interest. The founders were more bent on developing the resources and organizing the administration of the great territory that had come under their control, than on preserving the records of their proceedings for the benefit of posterity, while their immediate descendants, living in an uncritical age and possessed with a passion for rhetoric to the exclusion of history, carelessly permitted the records of the preceding generation to be scattered or ruthlessly destroyed. Documents that would now be regarded as precious memorials of the past, and that would throw valuable light on our early institutions, were used to feed the fires in the old courthouse.¹ Fortunately, sufficient fragments

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¹ *Cromwell v. The Bank*, 2 Wallace, Jr. Reports, 569 (1853), at page 589.

have escaped and found their way into the collections of individuals and societies to enable us, with the aid of the state archives, to present, if not a picture, at least a sketch of the judicial organization and procedure in a period which the rapidity of our national development has made more remote in thought than in time.

As the first organized settlements in the territory now included in the state of Pennsylvania were those of the Swedes and the Dutch, so the first courts of justice were established under their auspices. To give a complete account of their administration would involve a tedious narrative of the political vicissitudes of these unsuccessful colonies, which never developed to the point of establishing lasting institutions. In fact, throughout their stormy history the judicial and executive functions of the various governors and local officials are scarcely distinguishable.

The first Swedish settlement was hardly more than a trading post, and, if a court in the proper sense of that word existed, it must have been established by the governor, John Printz, who arrived at the colony on the Delaware in 1643 with instructions to "decide all controversies according to the laws, customs and usages of Sweden" and in all other things to "adopt and follow all the laudable manners, customs and usages of the kingdom of Sweden," the crown of which was then worn by Christina, the daughter of the great Gustavus Adolphus.

Printz established the seat of government on the island of Tinicum, but he must have found his duties onerous, for he wrote several times to obtain the services of a learned and able man to administer justice and attend to the law business.¹ The territory, however,

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¹ "I have several times solicited to obtain a learned and able man to administer justice and attend to the law business." Report dated February 20, 1647, to the West India Company. Records of Court at Upland, Introduction, p. 29; V Pennsylvania Archives (2d Series), 766.

passed into the possession of the Dutch West India Company, and Swedish law ceased to be a factor in the development of Pennsylvania, although the Swedes were permitted to retain their own magistrates, under the supervision of the officials of their conquerors.¹

In 1655, a vice directorship of the "South River" was created, and Jean Paul Jacquet, a former agent of the company in Brazil, was appointed to the office.² Andries Hudde, who had for some years managed the earlier Dutch settlement on the Delaware, was named as secretary, a commissary was appointed, and these, with two others, formed a council for general administration, as well as a court for the trial of civil and criminal cases, with right of appeal in all important matters to the director and council in New Amsterdam. The minutes of this court from December, 1655, to March, 1657, have been preserved, and afford some interesting information upon the methods and procedure of the Dutch justices, as well as the social condition of the colonists.³ Actions for the recovery of small debts are most frequent on the civil side, while on the criminal side, complaints for minor breaches of the peace are the principal matters disposed of. The striking features of these trials are the mild and paternal attitude of the court, the efforts made to obtain amicable adjustments of disputes, the merciful treatment of offenders, and the leniency to unfortunate debtors.

The following case, taken from the minutes of the court, July 7, 1656, is interesting as an early attempt to apply the principles of set-off:—

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¹ VII Pennsylvania Archives (2d Series), 511, 531. This policy seems to have alarmed the home authorities. VII Pennsylvania Archives (2d Series), 555.

² Hazard's Annals of Pennsylvania, 205.

³ New York Colonial Documents, Vol. XII, 133.

"Jan Flaman appears before the council against the wife of Tobias Willeborgh, and demands payment for a shirt lost by her, the defendant, and for passage from the manhattans hither, viz.

for the shirt	14
for her passage & freight	16
	30

The defendant says, that she lost on the voyage, being wrecked with the bark, a chest containing four shirts, one coat of red duffel, one underwaist coat, and a powder horn with copper mountings, valued by her, the defendant at fl 28.

Paid to plaintiff in money fl	4
From above	fl 28
	32

The defendant is told that the freight shall be set off against her lost goods; in regard to the shirt, she is ordered to pay plaintiff four guilders 15 stivers."¹

A case heard on August 2, 1656, gives new and interesting grounds for a continuance:—

"Before the council appeared Jacob Crabbe against Robert Martyn and complained that he Robert Martyn had shot and killed his, the plaintiff's pig. Defendant answers that fourteen days ago he entreated the plaintiff to pen up his hogs as the same did great damage to his corn. Plaintiff upon being asked what he wanted, answers, 'Payment for his pig.' It was proposed to the parties, that plaintiff shall take the pig, as it is still living, but that if it should die, each one shall keep his action in the law unprejudiced."²

Perhaps it may not be considered out of place to refer to a case tried September 13, 1655, in New Amsterdam as illustrating the pleasant side of judicial office in Knickerbocker days:—

"Jan Hackius Plf. v/s Jacob van Couwenhoven Deft. The Plf. demands paymands of 1150 fl. on account of a promissory note, dated July 1, 1655, payable in beer and distilled liquors.

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¹ New York Colonial Documents, Vol. XII, 149.

² New York Colonial Documents, Vol. XII, 150.

Deft. says his beer is ready. Plf. denies, that the beer is ready, and enquires if it be allowable to mix strong with small beer, and says the beer is not fit to be removed. Couwenhoven denies the same, and requests the Court to be pleased to test the same after adjournment of the session and then decide. Parties being heard, Jacob van Couwenhoven was ordered to pay Plf. the residue according to contract and obligation; And the beer having been tested after adjournment of the Court the same was pronounced good. The Plf. was therefore ordered to receive the same."¹

Would Professor Wigmore call this autoptic profference?

As in the other Dutch settlements the principal prosecuting officer of the district was the schout whose duties combined those of a sheriff and district attorney; he convened the justices' courts and executed the orders of the states-general and officials of the company. Where local courts were established the justices were known as schepens. Their jurisdiction extended to the rendition of judgment for sums under one hundred guilders. In cases exceeding that amount the party aggrieved was allowed an appeal to the director general and council of the New Netherlands. The schepens also had authority to pronounce sentence in criminal cases subject to appeal.²

In 1656 the Dutch India Company, being deeply in debt and compelled to obtain aid from the city of Amsterdam, transferred to that city a portion of their possessions on the Delaware. This colony was called New Amstel, special inducements were held out to emigrants, and a town government was established consisting of a schout, three burgomasters and five to seven schepens, a formidable body for the government of a village of less than five hundred inhabitants. Thence-

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¹ Records of New Amsterdam Court, Vol. I, 358.

² O'Callahan's History of New Netherlands, Vol. I, 220; VII Pennsylvania Archives (2d Series), 521, 528, 534; Hazard's Annals of Pennsylvania, 221.

forth the jurisdiction on the river was divided between the officials of the company and those of the city's colony.¹

Laws and ordinances were sent from New Amsterdam to the Delaware and there proclaimed for the general government of that territory. With occasional modifications, they were the same as prevailed in the older settlements on the Hudson, the ordinances of the West India Company, the civil law, the enactments of the states-general, and the customs of Holland.

In the matter of granting divorces the magistrates of the New Netherlands exercised a liberal policy in keeping with the doctrines of the Reformation, a policy that was not destined to survive the English Conquest.² Traces of this jurisdiction are found on the Delaware. Vice Director Beekman, writing to the director general under date of April 28, 1660, mentions a Finnish couple who lived together in constant strife: "The wife receives daily a severe drubbing, and is often expelled from the house as a dog. This treatment she suffered a number of years; not a word is said in blame of the wife, whereas he, on the contrary, is an adulterer; on all of which the priest, the neighbors, the sheriff and the commissaries appealed to me, at the solicitation of man and wife that a divorce might take place and the small property and stock be divided between them."³

He asks for orders but the reply is not given.

In 1662, the Finnish priest Laers, or Laurentius, Carels, whose wife had eloped with Jacob Jough, married again before he had obtained letters of divorce from the council, performing the ceremony himself. He was condemned by the commissaries to pay a fine of two

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¹ Hazard's *Annals of Pennsylvania*, 220; V *Pennsylvania Archives* (2d Series), 459.

² Howard's *Matrimonial Institutions*, Vol. II, 376.

³ VII *Pennsylvania Archives* (2d Series), 634.

hundred guilders and his new marriage declared illegal, but was advised to apply to the director general for a divorce.¹

At the last period of the Dutch dominion (1673-4) three judicial districts were recognized, one for the inhabitants of the Whorekill, between Cape Henlopen and "Boomties" (Bombay) Hook, another for New Amstel, from Bombay Hook to Kristina Kill, and a third for Upland from Kristina Kill "unto the head of the river."² Roughly speaking, the first of these districts corresponds to the lower counties of the state of Delaware, the second to New Castle County, in that state, and the third to so much of the southeastern part of Pennsylvania as was then settled, extending to the falls at Trenton.

The humble and widely scattered settlers seldom had time or occasion to indulge in law suits involving questions or amounts beyond the limited jurisdiction of the schepens, but such disputes as did arise were the cause of endless discussion and much heartburning between the officers of the West India Company and those of the city of Amsterdam, whose complaints and recriminations distracted the governor at New Amsterdam. In justifying the action of the council in such a contest Peter Stuyvesant writes to the directors in Holland: "We might here remark upon and continue with the insults and slights, heaped on your Hon^{ble} Worships' servants in their capacity as supreme judges of this province, but will desist for the present to keep ourselves above party spirit and avoid further displeasures." Appeals heard and decided by the governor

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¹ Hazard's Annals of Pennsylvania, 330, 333; VII Pennsylvania Archives (2d Series), 670, 672, 680.

² Hazard's Annals of Pennsylvania, 407; VII Pennsylvania Archives (2d Series), 758; Whorekill is a corruption of Hoorn Kill, Sussex Records (Turner), 2.

and council seem to have been carried to the directors in Holland, and occasionally reversed to the chagrin of Stuyvesant, who thus reproaches his employers in a letter dated July 21, 1661:—

“Your Noble Worships say in regard to the third and last point concerning the appeal and the reversing of a sentence pronounced against one Jan Gerritsen van Marcken, that we would have done better not to meddle with this case. Honorable Worships! It surpasses our conception to understand how to avoid such proceedings and the reproaches following them, how to satisfy your Honors and the parties to the suit without exposing ourselves to blame for refusing a hearing and justice, as long as it is your Honble Worships’ order, and pleasure, that appeals are to be brought before your Honors’ humble servants and we declare with good conscience that in this and the abovementioned case we have not aimed at nor intended anything else, but what we in our humble opinion judged to be just, equitable and our duty: God the Ominiscient is the witness for it: we have no knowledge of it, that the Sheriff van Sweeringen was to be forced here, to ask pardon of God and justice in addition to what his opponent had demanded: we refer to the sentences regarding this point.”¹

Dutch rule and Dutch laws, however, were not destined to endure on the Delaware. On the twelfth of March, 1664, Charles II of England granted to his brother, the Duke of York (afterwards James II), the territory comprising the New Netherlands.

The charter to James is neither as elaborate nor as carefully drawn as that granted eighteen years later to Penn. The standing committee of the privy council for the foreign plantations had been but recently organized and the Crown lawyers were just beginning to realize that vast problems, legal and social, were connected with the administration of the colonial domain. It has been well said that in the colonial charter will be found the germ of American constitutional

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¹ VII Pennsylvania Archives (2d Series), 662.

law, whether of the trading company or proprietary type, since it contained beside the grant of territory a scheme of political organization.¹ It is a significant fact that the charter of James contains no reference to a legislative assembly; the Duke is given "full and absolute power and authority" to "correct, punish, pardon, govern and rule" the inhabitants of the territories according to such laws, ordinances and directions as he should establish, not contrary to the laws of England, reserving to the Crown the right to hear and determine appeals from judgments or sentences there given.²

With the history of the conquest of the New Netherlands we are not directly concerned; suffice it to say that Sir Robert Carr who was charged with the reducing of the Dutch possessions on the Delaware arrived at that river in the latter part of the year 1664, and without much bloodshed obtained the surrender of the colony. Carr established the seat of government at New Amstel, the name of which was now changed to New Castle, and under the terms of his agreement with the inhabitants, continued all the magistrates in their offices upon their taking the oath of allegiance.³ The wise policy of enlisting the local authorities in support of the new government was continued, and Dutch and Swedish magistrates administered justice to their neighbors until long after the arrival of William Penn.

The period of the Duke of York's rule is of more importance in our judicial history than would at first be supposed. It was a formative period, and the law and practice as then developed had a marked influence upon the early legislation of the province of Pennsylvania.

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¹ Constitutional law by S. E. Baldwin in *Two Centuries Growth of American Law*, 11.

² V *Pennsylvania Archives* (2d Series), 494.

³ V *Pennsylvania Archives* (2d Series), 544.

The establishment of English jurisprudence in the colonies on the Delaware was not the work of a day, but a gradual process, involving compromises with the established customs and practices of the inhabitants, the gradual transformation of the Dutch schouts and schepens into their English equivalents, the education of the magistracy in the rudiments of English court practice and the actual modification of many of the rules of the common law, both as to property and practice, to meet the necessities of the primitive social conditions in the New World.

The legal conceptions of the new rulers found expression in a brief code promulgated at Hempstead, Long Island, in 1664, which, quaint and unsystematic as it may seem to us now, contained several notable departures from the common law well worth careful study by those interested in legal history.

The principle seems to have been generally accepted in the American colonies that the elements of public and private law should be stated in a concise and permanent form. Whether originating with the people, as in the case of the "Body of Liberties" in Massachusetts, or with the proprietors, as in the case of the "Fundamental Constitutions" of the Carolinas, the tendency of early colonial law was toward codification.¹ And what could be more natural than that both adventurers and proprietors should dream of creating little Utopias by force of the statute book? New conditions, too, required new measures, the laymen who administered justice required brief and simple handbooks for their guidance, and the mixed population a homogeneous system in the place of their various ancestral customs. Such a code was the Duke of York's Laws which is stated to have been "Collected out of the Severall Laws

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¹ Reinch's Colonial Common Law, reprinted in *Select Essays in Anglo-American Legal History*, Vol. 1, 367.

now in force in his Majesties American Colonyes and Plantations." Prior to the conquest of the New Netherlands, Colonel Nicolls, the newly appointed governor, and Sir Robert Carr had been appointed members of a commission for the visitation of the New England colonies, a part of whose duties it was with diligence and care "to peruse the collection of the lawes published in those colonies during the late usurping Government, or at any tyme before or since; to the end that upon examination thereof you may discerne both the indecent expressions and material and important points and determinations in them, which are contrary to our dignity and to the lawes and customes of this realme and to the justice thereof; all which they have obliged themselves to cancele and repeale; and if the same bee not already done, you are in the first place to cause it to be done."¹

The commissioners were also empowered to hear all complaints and appeals in matters military, criminal and civil, but it was left to their discretion whether they would first visit New England or reduce the Dutch to submission. Having carried out the latter project it became necessary at once to organize the captured territory. The greater part of Long Island was already occupied by settlers from New England and, having obtained copies of the laws of Massachusetts and New Haven, Nicolls² with the assistance of the secretary

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¹ V Pennsylvania Archives (2d Series), 501, 507.

² Broadhead's History of New York, Vol. II, 66. Governor Nicolls writes to Clarendon April 7, 1666: "My Lord, I have remitted for confirmation to his Royal Highness the present Lawes of this Colony collected out of the Lawes of the other Colonyes, onely with such alterations as may revive the memory of old England amongst us, ffor Democracy hath taken so deepe a roote in these parts, that ye very name of a Justice of the Peace is an abomination." New York Historical Society Collections, 1869, p. 75.

and some of the magistrates prepared a code which, as a comparison will show, drew much of its material from these sources with, in the governor's words, "a relaxation of their severity in matters of conscience and religion." The cruel laws against heretics and against "a pernicious sect commonly called Quakers"¹ were omitted, as well as many other provisions relating to the Puritan discipline. The "capital lawes" were transcribed from the Massachusetts code, which was avowedly based on the Old Testament, but the offense of witchcraft was omitted and while the clause making it a capital offense for children above sixteen years old to curse or smite their parents was retained, the succeeding clause, enabling a man having a stubborn or rebellious son to bring him to the magistrates to be put to death in accordance with Deuteronomy, xxi, 18, was rejected.

As in its prototypes, the code is divided into titles arranged in alphabetical order but the classification is neither logical nor consistent, a failing noticeable in more modern and more pretentious legal productions. Much, however, that was adopted was both valuable and practical and, with additions from English and Dutch sources, was moulded into a form that perhaps met best the needs of civil administration in a newly organized proprietary province. Indeed we may recog-

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¹ Laws of Massachusetts Colony (1672), 61. The Act of 1661 provided that "Vagabond Quakers" should "be stripped naked from the middle upwards, and tyed to a Carts tail, and whipped through the Town, and from thence immediately conveyed to the constable of the next Town towards the borders of our jurisdiction, as their warrant shall direct, and so from constable to constable till they be conveyed through any the outwardmost Towns of our jurisdiction." If the Quaker returned he was to be branded and whipped as before and if he returned again suffer death. The Act of 1662 reduced the whippings to three towns.

nize in this as well as other provincial codes a kindred spirit, which without attempting to exploit many theoretical views on jurisprudence, drew upon a common source for so much of English law and custom as could reasonably be applied to the social and economic conditions of frontier life.

It is most difficult to determine how far the common law was viewed as a subsidiary system when not replaced by colonial statutes. The accepted theory that the colonists brought with them and adopted so much of the common law as was applicable to their condition¹ is not wholly borne out by the facts. As the colonies increased in wealth and population, as their commercial relations with the mother country became more complex, the doctrines of the common law were necessarily drawn upon to fill up the gaps in the early legislation, and, as friction with the home government increased, the popular party appealed more and more to the common law, particularly to Magna Charta, as the muniment of political liberty and birthright of Englishmen, an appeal which writers such as Blackstone sought to evade by applying to America the status of conquered territory.²

Even more obscure is the question of the applicability of English statutes, but the principle was generally accepted that acts of parliament passed after the settlement of a colony were not in force there unless the words of the act expressly included the territory so

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¹ Story, J., in *Van Ness v. Packard*, 2 Peter's Reports (U. S.), 144 (1829); *Commonwealth v. Knowlton*, 2 Massachusetts Reports, 530 (1807); *Bogardus v. Trinity Church*, 4 Paige's Reports (N. Y.), 197 (1833).

² Blackstone's Commentaries Introduction, page 107, and Notes of American Editors, particularly Hammond; *Johnson v. McIntosh*, 8 Wheaton's Reports (U. S.), 582 (1827).

occupied,¹ although in some instances local usage would seem to have given the force of law to a statute not so extended. The subject is difficult and intricate.² But at the early period now under discussion the tendency was to regard the elementary codes as approximately complete statements of the law. For matters not covered New England referred to the "Word of God" as contained in the Scriptures, while in the south the inclination was to claim a share in the laws of England, but in either case the application of these vague principles left in the local magistrates a very wide discretion which in the absence of professional criticism was checked and restrained only by legislative action or the influence of the governor and council.³ In the Duke of York's Laws the difficulty is met by the following clause:—

"In regard it is almost impossible to provide sufficient Lawes in all Cases, or proper Punishments for all Crimes. The Court of Sessions shall not take further Cognizance of any Case or Crimes, whereof there is not provition made in some Lawes but to remit the Case or Crime, with the due Examination and proof to the Next Court of Assizes where matters of Equity shall be decided, or Punishment awarded according to the discretion of the Bench and not contrary to the known Laws of England."⁴

An analysis of the substantive provisions of this code, however interesting, is outside of the scope of this dis-

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¹ *Anonymous*, 2 Peere Williams's Reports, 74 (1722); *Blankard v. Galdy*, 2 Salkeld's Reports, 411 (1694); *Anonymous*, 1 Dallas's Reports, 1 (1754).

² Chalmer's Opinions, 208; Report of the Judges, 3 Binney's Reports, 595 (1808); Pepper & Lewis's Digest of Pennsylvania Decisions, Vol. XX, col. 35347; *Commonwealth v. Burrell*, 7 Pennsylvania Reports, 34 (1847).

³ Sioussat's English Statutes, reprinted in Select Essays in Anglo-American History, Vol. I, 416.

⁴ Charter and Laws of Pennsylvania, 25. Upon such complaints of inconveniences and omissions the laws were several times amended. Charter and Laws of Pennsylvania, 58, 60, 68.

cussion. It is sufficient to note that New York, in passing from the status of a proprietary to that of a royal province, came more directly under home influences and, as in the case of Virginia, the more radical and experimental features of the early laws disappeared in the face of the constantly increasing influence of the common law, or what the colonial administrator understood as common law.

As to remedial law it was, in the first place, provided that all actions of debt or trespass under the value of five pounds between neighbors should be put to the arbitration of two indifferent persons of the neighborhood to be nominated by the constable, or if either of the parties refused their arbitration, the justices of the peace should choose three other persons who were to meet at the cost of him who dissented from the first method, and their award should be conclusive.¹ The practice of referring complicated cases to arbitration prevailed in the New Netherlands and this provision has been regarded as a survival of the Dutch custom.² Voluntary submissions were well known at the common law, but the principle of compulsory reference was then and still is to a certain extent, looked upon askance as an attempt to take away the palladium of liberty—the right to a jury trial.³ Arbitration, as we shall see, occupied a prominent place in Penn's system of justice, was by far the most popular method of determining minor civil cases during the early period in Pennsyl-

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¹ Charter and Laws of Pennsylvania, 3; see also page 51.

² Records of Court of New Amsterdam, Vol. I, 226, 230, 237, 268, 299.

³ Steven's Essay on Arbitration, 105. The principle of compulsory arbitration in partnership disputes was recognized in France by an edict of Francis II (1560) and an ordinance of Louis XIV (1673), incorporated in the Code Napoleon, L. 1, tit. 3, 2.

vania, and, though less used now, is still a part of the law. In 1677, the court at New Castle referred a dispute concerning the estate of a decedent to two arbitrators who were to examine the accounts and if possible decide the difference, otherwise to choose an umpire and report at the next court day.¹ In 1678 Hendrick Vanden Burgh petitioned the court complaining that he had bought a house and lot from one Vidette who had purchased from William Tom, deceased; that the lot was six feet less in breadth than the deed called for and praying that this be added from Tom's adjoining lot which was about to be sold:—

“The court answer that whereas this business in the Lyfetyme of Jan Vidette & M^r Tom was in question, and then decyded by M^r Moll, M^r Hans Blocq & Captⁿ Cregier as umpier and the Peticon^r now haueing in possession soe mutch ground as then the arbitratō^{rs} allowed, must therefore Rest himself Contented wth ye same.”²

The courts were organized on a basis not dissimilar from that which already prevailed under the Dutch rule, with modifications suggested by the practice in the older English colonies. The principal court was the general court of assizes, held once a year in the autumn, presided over by the governor, and attended by the council, the mayor and aldermen of New York, and the justices of the various courts of sessions.³ No express provision for its creation is to be found in the laws although it is there incidentally mentioned, and, while the subject is obscure, the court was in fact the successor of that held by the director and council of the New

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¹ Records of the Court of New Castle, 94.

² Records of the Court of New Castle, 292.

³ Charter and Laws of Pennsylvania, 11. The Court of Assizes was abolished in 1684 by Act of Assembly. Scott's History of Courts of New York, 104.

Netherlands. The limits of its jurisdiction were undefined, and it seems to have combined both legislative and judicial functions; indeed it was the closest approximation to a legislature that New York was destined to enjoy for some time. The court heard appeals from the sessions and complaints against local officials, tried the more important civil cases and all capital cases, except where a special commission of oyer and terminer was issued to the justices of a distant community in order to obtain a more speedy trial.

The procedure on appeal was taken almost literally from the laws of Massachusetts relating to appeals to the court of assistants.¹ The appellant was required to give security for prosecuting an appeal and payment of damages. The grounds and reasons for appeal were to be filed with the clerk of the court. No justice that had sat or voted in the inferior court was permitted to vote in the court appealed to. Where the law and facts were found to agree with the former judgment it was not to be revoked, but the damages could be abated or increased as should be judged right.

Courts of sessions were established in districts roughly corresponding to counties (in the neighborhood of New York called Ridings in imitation of the division of the English County of Yorkshire). These courts were held three times in the year, and were attended by the justices of the peace. The governor, if present, presided, or in his absence a member of the council or the senior justice. All actions involving from five to twenty pounds were triable at this court, from which there was no appeal "unless the debt appear to be above that summe of twenty pounds or where there is a dubiousness in the expression of the law."² In addition the court

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¹ Laws of Massachusetts Colony (1672), 3; compare Charter and Laws of Pennsylvania, 7.

² Charter and Laws of Pennsylvania, 4.

was charged with the granting of letters of administration, the preservation of the peace, the trial of petty offenders, and the usual duties associated with the quarter sessions including the granting of liquor licenses, a duty still imposed on our quarter sessions to the discomfort of the judges. In this connection the law provided:—

“Every person Licenced to keep an Ordinary shall always be provided of strong and wholesome Beer, of four bushels of malt, at the least to a Hoggshead which he shall not Sell at above two pence the quart under the penalty of twenty shillings, for the first Offence, forty shillings for the Second, and loss of his Licence. It is permitted to any to sell Beer out of the Doores at a peny the Ale quart or under.

“No Licenced Person shall suffer any to Drink excessively or at unseasonable hours after Nine of the Clock at night in or about any their houses upon penalty of two shillings six pence for every Offence if Complaint and prooffe be made thereof.

“No Licenced Person shall unreasonably exact upon his Guest for any sort of entertainment, and no man shall be compelled to pay above eight pence a Meale, with small beer only, unless the Guest shall make other agreement with the person so lycenced.

“No Licence shall be granted by any two Justices in Sessions for above the terme of one year, but every person so Licenced before the expiration of the said Terme shall and are hereby enjoyned to repair to the Sessions of that Jurisdiction for renewing their several Licences for which they shall pay to the Clark of the Sessions two Shillings Six pence, or else they shall forfeit five pounds as unlicenced persons.”¹

Pure food agitation and rate regulation are thus foreshadowed, but not prohibition.

In all actions the plaintiff was required to file his declaration eight days before hearing.² The defendant

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¹ The law was soon amended “that Inn keepers or Ordinary keepers shall not bee obliged to put any perticuler quantity of Mault into their Beere.” Charter and Laws of Pennsylvania, 64. For a petition for a license to keep an ordinary see Records of Court of New Castle, 312.

² Charter and Laws of Pennsylvania, 4.

was permitted to take a copy thereof and file an answer. If judgment was entered for plaintiff it was endorsed on the declaration, if for the defendant on the answer. As in Massachusetts, no proceedings are to be reversed because of errors or mistakes "if the person and cause be rightly understood and intended by the court."¹ Imprisonment in civil cases was restricted. No man was to be kept in prison for a debt or fine longer than the second day of the sessions after the arrest unless it was made to appear that he had some estate which he would not produce; if the debtor had no estate he could be required to satisfy the debt by service.

In deference to the wishes of the New Englanders settled on Long Island provision was made for a town court consisting of the constable and overseers. The number of the latter was first fixed at eight but was subsequently reduced to four.² Their duties were chiefly administrative, but, in cases where the parties refused arbitration, the town court was to decide the case if less than five pounds was involved.³ The town system, however, was not destined to thrive in the middle colonies, and penetrated to the Delaware only in an attenuated form.

Last in the official scale was the constable, then, as now, the local peace officer. His badge of office was a staff six feet long with the king's arms thereon, which was to be provided at the cost of the town,⁴ but on the Delaware came out of the slender purse of the local Dogberry.⁵ Among his other onerous duties he was required to whip or punish any one so ordered by authority, "unless they can get another person to do it."

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¹ Charter and Laws of Pennsylvania, 11.

² Charter and Laws of Pennsylvania, 44, 69.

³ Charter and Laws of Pennsylvania, 60.

⁴ Charter and Laws of Pennsylvania, 22.

⁵ "The wch they will bee at y^e charge of themselves." VII Pennsylvania Archives (2d Series), 737.

A singular feature of the code was the section relating to jurors. It was provided that—

“No jury shall exceed the number of seaven nor be under six unless in Special Causes upon Life and Death, the Justices shall thinke fitt to Appoint twelve.”

“A verdict shall be so esteemed, when the major part of the Jury is agreed, and the Minor shall be concluded by the Major without allowance of any protest by any of them to the Contrary; Except in case of Life and Death where the whole Jury is to be unanimos in their Virdict.”¹

The source of this enactment, although not disclosed, will probably be found in a modified form in the Connecticut code of 1650² which left it to the magistrates—

“To impannell a jury of sixe or twelve, as they shall judge the nature of the case shall require—and if foure of sixe, or eight of twelve agree, the verdict shall be deemed to all intents and purposes, sufficient and full.”

In confirmation of this view the similar provision of 1665 in regard to the town courts may be recalled, where—

“The constable and overseers are to give their judgment by the Major vote, where six with the constable, or seaven in his absence, are competent and equivalent to a jury, and the constable upon equall Division, is to have a casting voyce.”³

In 1666, it was directed that in jury trials at the court of assizes the number of jurors should be twelve, but that at the courts of sessions the number set forth in the law should be sufficient.⁴

This remarkable deviation from the English jury system was not destined to survive. In the records of

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¹ Charter and Laws of Pennsylvania, 33.

² The Connecticut Laws of 1650 (Hartford, 1833), 60.

³ Charter and Laws of Pennsylvania, 60.

⁴ Charter and Laws of Pennsylvania, 69.

the court at Upland, to which reference will be made hereafter, there is a case concerning title to real estate which was tried in 1681 before a jury of seven,¹ but in other cases in the same court juries of twelve were drawn, as was the practice also of the court at New Castle.²

Penn in his laws agreed upon in England provided that all trials should be by twelve men, and this was made a fundamental law of the province.³ At the first court held at Lewes for the county of Sussex by commission of William Penn the legality of a prior verdict by a jury of seven was questioned. The suit was by Hermanns Wiltbank against Cornelius Johnson and is stated to be "by way of scarifacous"⁴ to show cause why the defendant should not give the plaintiff possession of certain land.

"According to An order of Court & verdict of a jurey of Seaven men obtaind in this Court the 8th day of the 1 Mo. 1681. The said Cornelis Johnson showeth cause by his plea delivered into the Court in writing that he had obtained in this court a verdict of a Jurey of twelve men for the said Land and premisses According to the Laws of England; and that the verdict of seaven men was and is Contrary to the knownen Laws of England."⁵

It was further alleged that Wiltbank had appealed from the former verdict against him and had failed to prosecute his appeal. The court with the consent of both parties referred the matter to the proprietor. At a subsequent court the plaintiff again brought up the

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¹ Records of the Court at Upland, 190; see pages 107 and 181.

² Records of the Court of New Castle, 12, 49, 53, 81, 133, 168, 174, 212, 217, 358, 436, 455.

³ Charter and Laws of Pennsylvania, 100, 117, 154.

⁴ Elsewhere in the record "searifacous" (*scire facias*, mistaken for *habere facias possessionem*).

⁵ Sussex Records (Turner), 86, 91.

matter, stating that the governor had confirmed his right to the land but had recommended that it should be left to the peacemakers to determine whether anything was due the defendant for his improvements. Failing to prove his declaration he was nonsuited but afterwards on the advice of the court the whole dispute was referred to arbitration.¹

The Duke of York's Laws were not put into execution in the territories on the Delaware immediately upon their adoption. As already stated, the Dutch and Swedish magistrates were retained in office, but it was wisely resolved to carry the necessary changes into effect gradually. In 1668 Governor Lovelace issued directions to Deputy Governor John Carre to associate the schout and certain magistrates with himself as a council, and that—

“The Lawes of the Governmt Establishd by his Royall Highness be shewed & frequently Communicated to the said Councillors & all oth^{rs}. To the end that being therwth acquainted the practice of them may also in convenient tyme be established wch conduceth to the Public Welfare & Common Justice.”²

Under this plan the government was steadily brought into harmony with English ideas, the temporary check received in 1673, when the Dutch for a few brief months repossessed themselves of the New Netherlands, scarcely interrupting this process. At a council held at New York, May 17, 1672, it was ordered:—

“That for y^e better Governmt of ye Towne of New Castle for the future, the said Towne shall be erected into a Corporacon by the name of a Balywick, That is to say, it shall be Governed by a Bailey & six Assistants, to bee at first nominated by the Governor and at y^e expiracon of a yeare foure of the six to go

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¹ Sussex Records (Turner) 102. In the earlier records there are cases tried before juries of both seven and twelve men.

² VII Pennsylvania Archives (2d Series), 722.

out & foure others to be chosen in their places, the Bailey to continue for a yeare, & then two to be named to succeed, out of whom ye Govern^r will elect one; Hee is to preside in all ye cort^s of the Towne & have a double vote. A constable is likewise annually to be chosen by ye Bench.

"The Towne Court shall have power to try all causes of debt or damage to the value of ten pounds without appeal.

"That ye English Lawes according to the desire of the inhabitants, bee establish^t both in ye Towne & all plantations upon Delaware River.

"That the office of Schout be converted into a Sherifalty & ye High Sheriffs power extend both in the corporacon & river & that he be annually chosen by two being presented to the Govern^r, of whom he will nominate & confirm one."¹

Finally, on September 26, 1676, an ordinance was passed by Governor Andros and the council formally introducing the Duke of York's Laws and establishing courts on the Delaware, the material portion of which is as follows:—

"Whereas upon a peticon of the Magistrates and officers of New Castle and Delaware River, Govenor^r Lovelace did resolve & in part settle the Establish Lawes of this Government and appoint some magistrates under an English Denominacon accordingly, In the which their having been an obstruction for reason of the late warres & Change of Government; And findeing now an absolute necessity for ye well being of the Inhabitants, to make a speedy settlement, to be a generall knowne rule unto them for the future, Vpon mature deliberation and advise of my Councell, I have resolved, and by vertue of the Authority derived unto mee, doe hereby in his Maties Name Order as followeth.

"1. That the booke of Lawes Establish^t by his Royal Highnesse & practiced in New Yorke, Long Island, and Dependencies bee likewise in force, and practiced in this River and Precincts, Except the Constables Courts, Country Rates & some-other

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¹ VII Pennsylvania Archives (2d Series) 748. The commission of Peter Alricks as "Bayliff" of the corporation of New Castle dated August 24, 1672, will be found in V Pennsylvania Archives (2d Series), 619.

things peculiar to Long Island, and the Militia as now ordered to remaine in y^e King, but that a constable in each place bee yearly chosen for the Preservacon of his Maties Peace with all other Power as directed by y^e law.

"2. That there bee three Courts held in y^e several (parts of the river) & bay as formerly. To witt one in the Townes (New Castle one above at) Uplands another below at the Whorekil.

"3. That the said Courts consist of Justices of the Peace whereof three to make a Coram, & to have the Power of a Court of Sessions & decide all matters under twenty pounds without Appeale, in which Court the oldest Justice to preside, unless otherwise agreed amongst themselves above twenty pounds & for crime Extending to life Limbo or Banishment, to admit appeal to the Court of Assizes.

"4. That all small matters under the value of five pounds may be determined by the Court without a jury unless desired by the Partyes as also matters of Equity.

"5. That the Court for New Castle bee held once a month, to begin the first Tuesday in each Month And the Court for Uplands & the Whorekill, Quarterly & to begin the Second Tuesday of the Month.

"6. That all necessary By lawes or orders (not repugnant to the Lawes of the Government) made by the said Courts, bee of force & binding, for the space of one whole yeare, in the severall places where made They givinge an Account thereof to the Governo^r by the first Convenience, And that noe fines be made or imposed but by order of Court.

"7. That the severall Courts have power to regulate the Court and Offic^{rs} Fees, not to exceed the Rates in the book of Lawes, nor to bee under halfe the Value therein exprest.

"8. That there bee a high Sheriffe for the Towne of New Castle, the River and Bay: And that the said high Sheriffe have power to make an Under Sheriffe or Marshall being a fitt person, and for whom hee will bee responsable, to be approved by the Court, But the Sheriffe, to act as in England & according to the now practice on Long Island, to act as a principall officer in the Execution of the Lawe, but not as a Justice of the Peace or Magistrate.

"9. That there bee fitting books provided for the Records in which all Judiciall Proceedings to be duely and fairely Entered, as also all Publick Orders from the Governo^r And the names of the Magistrates & Officers Authorized, with the time of their Admission: the said Records to bee kept in English, To which

all persons concerned may have free Recourse at due or seasonable times.

"10. That a fitt person for Clarke when Vacant, be recommended by each Court to the Governor for his Approbacon in whose hands the said Reccords to be kept.

"11. That all writts, Warrants & Proceedings at Law shall be in his Maties Name. It having been practiced in ye Government ever since the first writing of the Law booke, And being his Royall Highness Speciall pleasure & Order."¹

The promulgation of the laws and the more definite instructions for the administration of justice must have given general satisfaction, for in their communications with the governor the justices seem to have been in doubt on many points, and a delay in forwarding copies of the laws seems to have given them considerable anxiety. In a letter of June 8, 1677, the magistrates of New Castle write: "We likewise humbly desier that the sending of the Law booke may not be forgot, there being great occasions for the same."²

It may be interesting at this point to give a brief account of the most important civil suit fought out in the territory on the Delaware at this early date, involving the title to Tinicum Island. It was here, as we have seen, that the Swedish governor, John Printz, established the seat of government, building a block-house, church and private residence called Printzhof, the island having been granted to him in 1643 by Queen Christina "for a bouwery" as a reward for his services.³ After the Dutch conquest his daughter, Jeuffro Armgart, wife of John Pappegoya, the successor of Printz as governor, was on her petition, permitted in 1656 "to take possession and cultivate the lands of her lord and

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¹ VII Pennsylvania Archives (2d Series), 783.

² VII Pennsylvania Archives (2d Series), 787, also 777, 794, 797.

³ VII Pennsylvania Archives (2d Series), 494; Hazard's Annals of Pennsylvania, 70.

father."¹ Jeuffro Armgart as agent for her father sold the property on May 29, 1662, to Joost De LaGrange who paid one half of the purchase money and entered into possession. Trouble occurred at once over payment of the balance. In the latter part of 1662 a bill of exchange given by LaGrange was protested, Jeuffro Armgart recovered judgment and an appeal was taken. Printz died in 1663 and Jeuffro's power to act for her sisters was disputed. In the meantime the English conquered the New Netherlands, LaGrange died and his widow married Andrew Carr who obtained a patent for the island from Governor Lovelace in 1669. While the Carrs were abroad, looking after an estate they had inherited, Jeuffro Armgart returned with powers of attorney from her sisters and brought suit for the balance of the purchase money at the court of New Castle. The case was adjourned or appealed to the court of assizes at New York, where it was tried on October twelfth, 1672.² Some of the papers were in "high" and some in "low" Dutch and the services of an interpreter were required. The defendants' attorney, Mr. Ryder, protested that Captain John Carr's letter of attorney from Andrew Carr was not sufficient to authorize him to defend the suit and moved for a continuance, which was refused. The case was sent to the jury, who brought in a verdict for the plaintiff for the full amount of her claim upon which judgment was entered. In the month of January following the governor and council issued an execution directed to Captain Edmund Cantwell, high sheriff at New Castle, who was directed to seize

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¹ Hazard's Annals of Pennsylvania, 219, quoting Albany Records, Vol. XVII.

² Hazard's Annals of Pennsylvania, 400, quoting Albany Records, Court of Assizes, Vol. II, 293-300.

the land and goods of the Carrs, particularly Tinicum.¹ The latter island was to be appraised and if found of less value than the debt, the plaintiff was to be given possession and a further levy made on other property of the defendants. Jeuffro Armgart was accordingly restored to possession of the island which she sold to Justice Otto Ernest Cock. The new owner was, however, not to rest in quiet possession. Arnoldus De LaGrange, son of Joost, when of age returned to America and settled at New Castle where he subsequently became a justice of the peace. Shortly after his return he presented to Governor Andros a petition for equitable relief against the judgment of the court of assizes, setting forth his infancy at the time of the trial and other defects in the proceedings.² No answer to the petition is recorded but at the last session of the Upland court before the transfer of the territory to Penn held June 14, 1681, suit was brought by LaGrange against Cock which was postponed to the next court "by reason that there's noe court wthout Justice Otto whoe is a party."³ The case was finally tried at a court held at Chester 22, 6 mo. 1683, where LaGrange was represented by Abraham Mann and Cock by John White as attorneys in the suit. The plaintiff declared as heir at law and the defense was that part of the purchase money had never been paid. The verdict of the jury as entered on the record is:—

"The jury finde for ye Plaint and alsoe give him his costs of suite and florty shillings damage; the Plaint paying to ye

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¹ V Pennsylvania Archives (2d Series), 627. A second execution was issued in 1675 by Governor Andros, V Pennsylvania Archives (2d Series), 666. In Records of Court of New Castle, page 53, is a suit by the sheriff against the auctioneer for the amount realized at a sale under this execution.

² VII Pennsylvania Archives (2d Series), 799.

³ Records of the Court at Upland, 189.

Deft Thirty & seaven pounds & Tenne Shillings, according to an agreement between ye Plaintiff and Deft produced & read in this court & alsoe delivering ye Block House & pticuters in ye same agreemt mentioned. Judgmt is thereupon awarded."¹

Here we have an early, if not the first, example of a conditional verdict so popular afterwards in Pennsylvania when an equitable defense was raised in an action of ejectment. Execution issued on this judgment and LaGrange was put in possession. Less than a year afterward he sold the island to Christopher Taylor, the first register general, one of whose descendants left a will that gave rise, in the nineteenth century, to litigation as long and stubborn as that we have recounted.² The Printz mansion was destroyed by fire in 1822 but it is said that on the site ancient bricks of a foreign make and pale yellow color have been found which were once a part of this venerable structure.³

It would seem from the above proceedings and from an order of Governor Andros of July 17, 1678,⁴ that lands were regarded as liable for debts, contrary to the common law where the creditor's only remedy was by writ of *elegit* under which one half of the rents could be taken.⁵ Penn's first legislation subjected lands to execution to a limited extent, but not until 1700 was the

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¹ Chester County Records quoted in Ashmead's History of Delaware County, 280; see, also, Memoirs Long Island Historical Society, Vol. I, 189.

² *Hart v. Hill*, 1 Wharton's Reports, 124 (1835); *Tinicum Fishing Co. v. Carter*, 61 Pennsylvania Reports, 21 (1869); 77 Pennsylvania Reports, 310 (1875); 90 Pennsylvania Reports, 85 (1879).

³ Smith's History of Delaware County, 31.

⁴ VII Pennsylvania Archives (2d Series), 797. In the case of a decedent, Andros seems to have solved the question of title by directing that the purchaser should have "a new pattent for his title."

⁵ III Blackstone's Commentaries, 419.

whole land made liable where no personal property could be found.¹

That land was subject to seizure for debts under the Dutch rule is indicated by the following extract from the minutes of Jacquet's court, February 14, 1657:—

"Isack Allerton has had seized by the Court Messenger subject to the decision of the Hon^{ble} Council, the immovable property belonging to Peter Hermausen here on the river."²

From such records as have escaped destruction we are enabled to present a fair outline of the actual practice in these primitive tribunals, presided over by laymen and unembarrassed by the conflicting arguments of professional lawyers. An adequate notion of the crudity of the proceedings can be conveyed only by examples from the records which were kept in the most informal fashion. Sometimes the entries are limited to the names of the parties and the judgment, while in other instances there is a summary of pleadings and evidence. While the names of common law actions, such as debt, case and replevin, are used there is little to indicate that judges or parties had more than a very vague conception of their scope and distinctions. Thus, there is an entry of "an action of the Case for twoo peeces of marrish & y^e hay thereon mowed."³ Appeals to New York were frequent and were sometimes specially allowed by the governor, as would appear from the following example:—

"By the Governor

"Upon the request of Hans Pieterse, concerning several Judgmts of the Courts of New Castle & Upland in Delaware in a case between the sd Pieterse & D^o Lawrentius Carolus,

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¹ *Presbyterian Corporation v. Wallace*, 3 Rawle's Reports, 108 (1831) at page 141.

² New York Colonial Documents, Vol. XII, 160.

³ Records of the Court of New Castle, 355; see, also, *Jegou v. Wright*, Upland Records, 140.

concerning a certain Mare, The Jureys tho' composed in part of the same Persons, yet brought in several Verdicts, the Courts having given different Judgm^{ts} accordingly, & it not appearing by any Testimonies what Mare was in Difference; I do therefore hereby Order, that the Execucons in s^d Matter be Suspended, & a full Acco^t of all s^d Proceeding in both Co^{ts} be forthwith sent me.

"Actum in New York this 28th day of July, 1677.

"E. ANDROS.

"To the Courts of New Castle and Upland & all Officers in Delaware whom it may concern."¹

Such appeals were heard at the general court of assizes in the city of New York, the minutes of which present a spirited picture of assembled worthies. One appeal from a judgment of the court at the Whorekill concerning the title to a tract of land was tried in 1680 before the following distinguished company: the governor, Sir Edmund Andros, five members of the council, the mayor and five aldermen of New York, the chief justice of Nantucket, the two commissaries of Albany, three justices from New Jersey, two from "Peniquid and parts eastward," and a dozen more from Long Island and New York. The judgment of the lower court was affirmed at the cost of the appellant.² On another occasion (in 1681) a case was tried in which the defendant, one of the justices of the court at New Castle, was accused of misconduct in his office.

"Mr John Moll Justice of the Peace and President of the Court at Newcastle being called to Answer to an Indictment Exhibitted against him by one Abram Mann for severall Words and Expressions by him said to be uttered and spoken in Court and at other Times, To which the said John Moll pleaded not Guilty, and a jury being Impanelled and Sworne with several Evidences they brought in their Verdict and found him guilty of Speaking the Words mentioned in the first and second Articles and of

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¹ V Pennsylvania Archives (2d Series), 692; see in the court below New Castle Records, 88; Upland Records, 74.

² V Pennsylvania Archives (2d Series), 721.

Denying Execution when demanded, menconed in the fourth Article, and for the rest not Guilty, the which the Court taking into Consideration Do adjudge the said Indictment to be illegal and vexatious and that the said John Moll by what found against him is not Guilty of any Crime or Breach of any known Law Therefore do Acquitt the said John Moll from the same and Order the said Abram Mann to Pay the Costs of Court. The said Mann moved for an Appeale for England which is granted he giving sufficient Security to the value of One Thousand Pounds to Prosecute the same and pay damage to the Party if lost."¹

It is interesting to note that the parties to this suit were afterwards prominent in Penn's government. Justice Moll became a member of the first provincial council and was one of the committee that drew up the amended frame of government, or charter of 1683, while Abram Mann was a member of the assembly from New Castle in the sessions of 1684-5.

It would not do to omit mention of the first state trial, if it may be so called, that was held on the Delaware. Near the close of 1669 a disturbance was created by one Marcus Jacobson, alias John Binckson, but better known as "Long Finne," who pretended to be a son of Conningsmark, a Swedish general. Whether this so-called insurrection was a serious attempt to overthrow the government, or a mere riotous or seditious disturbance, it was treated with the utmost seriousness by Deputy Governor Carr as well as Governor Lovelace. An order for the Finne's arrest was issued, and he was put in irons, while the other persons implicated were bound over for court. At a meeting of the council in New York on October 18, 1669, it was resolved:—

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¹ V Pennsylvania Archives (2d Series), 722. Abraham Mann not satisfied with the judgment of the Court of Assizes attempted to post on the door of the court at New Castle a paper containing his version of the proceedings, in which the court was charged with partiality. A warrant was issued for his arrest but he fled up the river. New Castle Records, 497, 514.

"Vpon serious & due Consideracon had of the Insurrection begann by ye Long Finne at Delaware, who gave himself out to bee son of Coningsmarke a Swedish Generall & y^e dangerous consequences thereof, It is adjudged that ye said Long Finne deserves to dye for the same. Yet in regard that many others being concerned wth him in that Insurrection might be involved in the Premunire if the rigour of the Law should be extended & amongst them divers simple and ignorant People: It is thought fitt and Ordered, that the said Long Finne shall be publickly & severely whipt & stigmatiz'd or branded in the fface with the Letter (R) with an Inscription written in great Letters & putt upon his Breast, That he received that Punishment for Attempting Rebellion, after wh^{ch} that hee bee secured untill hee can bee sent & sold to the Barbadoes or some other of those remote Plantations."¹

But after deciding upon his fate, it was determined to try him according to the forms of law and a special commission was issued to Mathias Nicolls and others to try him, whose instructions were to hold the court according to a prescribed form, which presents an excellent picture of the practice then followed in a criminal trial.

"The forme of holding the Co^{rt} at the Fort in Newcastle upon Delaware River for the Tryall of the Long Finne &c. about the late Insurrection, Decem. y^e 6th 1669.

"Vpon the meeting of the Court let a proclamation bee made by saying, O yes, O yes, O yes, Silence is commanded in the Co^{rt} whilst his Maties Commissioners are sitting Vpon paine of imprisonment.

"Lett the Commission be read & the Commission^{rs} called vpon afterwards, if any shall bee absent Let their names bee recorded.

"Then let the proclamacon bee made again by O yes, as before, after which say: All manner of persons that have anything to doe at this speciall Co^{rt} held by Commission from the Right Hoble Francis Lovelace Esq. Governo^r Gen^{rl} vnder his Royal Highness the Duke of York of all his Territories in America draw neare to give yo^r attendance, and if any one have any plaint to

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¹ V Pennsylvania Archives (2d Series), 579, 582, 584; VII Pennsylvania Archives (2d Series), 723, 725.

enter or suite to prosecute let them come forth & they shall bee heard.

“After this let a jury of twelve good men bee empannelled.

“Then let the Long Finne prisoner in the Fort bee called for & brought to the Barre.

“Vpon which the jury is to be called’ over & numbered one, two &c. & if the prisoner have no exception against either of them let them bee sworne as directed in the Booke of Laws for Tryall of Criminals, and bid to look vpon the prisoner at the Barre.

“The forme of the oath is as followeth: You do swear by the Everliving God that you will conscientiously try and deliver your verdict between o^r Sovaraigne Lord the King, & the prisoner at the Barre according to evidence & the lawes of the Country, so helpe you God & the contents of this booke.

“Then let the prisoner bee again called vpon and bid to hold up his right hand:

“Viz. John Binckson alias Marcus Coningsmark alias Coningsmarcus alias Mathew Hincks. . . .

“Then proceed with the indictment as follows:

“John Binckson, Thou standest here indicted by the name of John Binckson alias Coningsmark alias Coningsmarcus alias Mathews Hinks, alias, etc. for that having not the feare of God before thine eyes but being instigated by the devill vpon or about the 28th day of August in ye 21st year of the Raigne of o^r Sovaraigne Lord Charles the 2d by the Grace of God of England Scotland, France and Ireland, King, Defender of the Faith &c. Annoque Domini 1669, at Christina & at severall other times & places before, thou didst most wickedly, traitorously, feloniously & maliciously conspire and attempt to invade by force of armes this Government setled vnder the allegiance and protection of his Maties & also didst most traitorously solicit & entice divers & threaten others of his Maties good subjects to betray their allegiance to his Maties the King of England persuading them to revolt & adhere to a forraign prince, that is to say, to the King of Sweden In prosecution whereof thou didst appoint and cause to bee held Riotous, Routous & Vnlawfull Assemblies, breaking the Peace of o^r Sovereign Lord the King and the laws of this Government in such cases provided John Binckson &c what hast thou to say for thyself, Art thou guilty of the felony & treason layd to thy charge or not guilty. If hee says not guilty, then ask him By whom wilt thou be tryed. If hee say be God & his countrey, say, God send the a good deliverance.

"Then call the witnesses and let them bee sworne either to their testimony already given, in or to what they will then declare upon their oaths.

"Vpon which the jury is to have their charge giving them directing them to find the matter of Fact according to the Evidence and then let them bee called over as they go out to consult upon their verdict in which they must all agree.

"When the jury returns to deliver in their verdict to the Court let them bee called over againe & then ask^t: Gent^s, are you agreed upon your verdict in this case in difference between o^r sovereign Lord the King & the prisoner at the Barr. Upon their saying yes, aske who shall speak for you. Then the . . . . . bring in their verdict & the . . . . then read the verdict and say: Gentlemen, this is y^r verdict upon which you are all agreed; upon their saying yes, call that the prisoner bee taken from the barre & secured."¹

As a matter of course the Finn was convicted and sentenced. The last we hear of him is in this minute of the council, January 25, 1669-70:—

"This day ye Long finne called Marcus Jacobsen was by warrt put on board Mr. Cosseans Ship called ye Fort Albany to be Transported & sould at ye Barbadoes according to ye sentence of Court at Delaware for his attempting rebellion. He had beene a prisoner in ye State house ever since ye 20th day of Decemb^r last."²

We are fortunate in possessing portions of the records of the county courts during this period. That of Upland is particularly interesting as presenting a complete record of the first county court on Pennsylvania soil from the year 1676 to the announcement, in June, 1681, of the transfer of the government to William Penn. In the commissions issued by the governor six justices of the peace are named, any three or more of whom may hold court, the commissions to be in force for one year or until further order. It would be tedious to recite the

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¹ VII Pennsylvania Archives (2d Series), 728.

² VII Pennsylvania Archives (2d Series), 731.

manifold duties performed by the justices, whose functions included those now delegated to the county commissioners, directors of the poor and auditors as well as those pertaining strictly to their judicial office. They granted applications for taking up land, took acknowledgments of deeds, and exercised a general supervision over the churches, the repair of the highways, the maintenance of fences, the sale of the time of bound servants, and even recorded the earmarks of cattle.

The expenses connected with the sittings of the courts were supposed to be met by the fees and fines imposed, but these were not always easily collected and the Upland justices record in one place that they are "in great want of some meanes to pay and defray their necessary charges of meat and drinke."¹ The court at the Whorekill, the name of which had been changed to Deal, made this clever bargain:—

"It is agreed and Concluded upon by the Court and Alexander Moulston as followeth; that from the first day of this moneth the said Alexander Moulston shall have to his owne proper use all the Amacements that doe from that day becom due to the court for one whole yeare; and that the said Alix Moulston doe Ingage to find and allow the Justices of this Court for the time being and there friends and strangers with house roome and diett And one gallon of Rum and wine for every Court during the said year."²

Actions for the recovery of debts, for assault and battery and slander predominate. It would seem that the judges sometimes found it necessary to appeal to their own tribunal, as the following case shows:—

"Justice Otto Ernest Coch Plt.	{	In an action of slaunder & defamat.
"Moens Petersen Staeket Deft.		

"The pl^t Complaines that this deft. maliciously has defamed and most highly slaundered him in his Honor & reputation

¹ Records of the Court at Upland, 160.

² Sussex Records (Turner), 69.

by terming him a hogh theef, desires that this deft (if hee or any others can) will prove ye same, or otherwayes that hee may bee punisht according to Lawe.

"The deft sayes and protests, that hee never Knew heard or sawe, that this Plt was guilty of any such fact, and that hee to his knowledge never sayed any such thing, but if that he hath sayed itt (as the witness doe afirme:) that itt must haue been in his drink, hee humbly desires forgivenessse, sence hee finds himselfe in a great fault;

"Hans Jurian, william orian & andries homman sworne in Court declare that they haue heard moens Peterss Staeket say in full tearmes & substance, Mr. Otto is a hogh theef of ye one & andries Boen of ye other syde & further say nott;

"The Court haueing heard ye Case doe order that ye deft: shall publicqly in open Court declare that hee has wrongfully falsly & malisiously slaundered & blamed this plt and doe further fyne him for an Example to others to pay the sume of one thousand gilders wth the Costs;

"The deft. did willingly in open Court, declare as above & humbly desires forgivenessse & prayes that ye fyne may bee remitted, Upon ye Intercession of Justice Otto Ernest, the Court did remit ye fyne aboved." ¹

Judgments are entered sometimes in guilders and stivers and sometimes in pounds of tobacco, wheat or other products. In one case at Upland the court ordered the defendant to pay the plaintiff "twenty guilders in wheat and twenty six in pompkiens."²

A case, showing the primitive practice, from the commencement to the termination of a suit, is that of—

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¹ Upland Court Records, 180. In another case of slander the court fined the defendant and ordered "that ye defendant openly shall declare him selfe a Lyar," page 176. "In the Norman Custumal it is written that the man who has falsely called another 'thief' or 'manslayer' must pay damages, and, holding his nose with his fingers, must publicly confess himself a liar." Pollock and Maitland History English Law, II, 537.

² Records of the Court at Upland, 156.

"James Sanderlins plt
agst

"John Edmunds of
maryland Deft

"The plt demands by bill from this def^t. ye s^ume of 1200 lb of good & merchandable Tobbacco & Caske to bee paid in Great Chaptank River in maryland on all demands after ye 10th of october 1675; as by the said bill under ye hand and seale of the def^t bearing date ye 9th of June 1675; & produced in Court did more att Large appeare, the plt further declaring & prooveing in Court that hee hath made severall Legall demands of the s^d debt, and ye the same was not paid to this day, desiering that this Co^rt would bee pleased to grant him Judgem^t agst ye def^t and to allow of his attachment Laid upon a certaine great Boate or shiallop & appurtenances now att upland—That the same might bee publicqly sould and the p^lt payed his Just due wth ye Costs;

"m^r walter wharton one of the witnesses to ye s^d bill being sworne in Court declared that hee was p^rsent and did see John Edmundsen signe seale and deliver, the abovesaid bill of 1200 lb of Tobacco, to James Sanderlins;

"The Court haueing Examined into ye businesse, and finding the Case to bee Just, did order that Judgment bee Entered against the def^t: John Edmunds, for the paym^t of ye s^d. 1200 lb of Tobacco, or the True value thereof, and alloweing of ye Plts attachm^t doe hereby order the vendu master, to sell the boate & appurtenances, this Courtday to the most bidders, out of which hee to pay James Sanderlins his debt wth ye Costs, and the overplus to bee returned to John Edmunds or his order;

"According to the aboves^d order of Co^rt was this day being ye 12th of Novem^br, by publicq outcry sould unto m^r John Test, as ye highest bidder the boate & appurtenances for ye s^ume of six hundred and twenty fyve gilders; to bee paid in New Castle with merchandable Tobbacco & Caske dutch wth & tarr att 8 styvers pr lb or wth merchandable wheat at 5 gilders pr schipple att or before ye Laest of march next Ensuing, as by the Conditions of sale upon ye fyle att Large doth & may appeare;

"James Sanderlins bound himselfe as security for ye true payment of ye aboves 625 gilders according to the conditions"¹

As these proceedings occurred all on one day, the parties could not complain of the delays of the law.

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¹ Records of the Court at Upland, 111.

What would appear to be the first recorded action for negligence is entered as follows on the New Castle records:—

“Mounes Powell plt

“Hans Pietersen Deft

“The plt declares that this deft about one Jeare sence was the occason that he the plt lost the use of his boddie so that he was & is not able to worke for his wife and family and therefore humbly craves that the deft may be ordered to hire a servant for him until he bee restored to health:—The court having heard the answer of the deft and finding by the evidence sworne in court, as also by the plt owne confession that itt was an accidental mischange, doe order that the deft shall pay the curing to the doctors bill this date and moreover Pay unto the plt in regard of his smart and Payne w^{ch} the plt hath suffered the sume of one hundred and fifty gilders and pay cost of sute.”¹

In another case in 1679 a mortgage is foreclosed:—

“John Moll Plt

“Robberd Hutchinson Deft

“The Plt declares that one Daniel Linsy being his debtor the sume of 847 lb of Tobacco & Caske did on ye day of 167 ; mortgage Trasport & make over unto this Plt a Certain peece of Land Lying in Appoquenemen Creeke, above ye old Landing w^{ch} s^d mortgage and Transp^{rt} was to bee void upon ye payment of ye s^d 847 lb of tobb att ye time in ye s^d deed Exprest, as by the s^d mortgage bearing date as above more att Largedid appeare and that this deft Robberd hutchinson, haueing sence bought the s^d Land from ye s^d Linsey did promise to pay ye Plt his s^d debt w^{ch} being nott performed, The Plt is now forced to Commence his action in Lawe, and humbly Craues this Cor^{ts} order so that hee may haue ye forfeiture and benefitt of his afores^d mortgage and that hee may bee put in peaceable Possession of the s^d Land according to s^d deed. The Cor^t haueing Examined the premises doe Judge that according to Lawe and the s^d deed the Land aboves^d is forfeited and belonging to ye Plt and therefore do order that the Plt bee put in Lawfull Possession thereof.”²

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¹ Records of the Court of New Castle, 9.

² Records of the Court of New Castle, 341.

A case that perplexed the justices at Deal involved a gambling contract.

"Henry Bowman Plt, James Welles and John Newall defts. The Plt declare that the defts did contract & agree wth him to Run A horse Race for three thousand pounds of Tobacco; and that he the said Plt ded wine; the deft pleaded that the Contract was not confirmed, the cause being debated on both sides and severall witnesses Examined the Cause was Referred to a Jurey; wch went out and brought in there verdict; that they finde for the plt with Cost of suit and one shill Damages; and the defts arest the Judgmt of the Court & craved an Appeale to have the Cause to be Tryd at the next Gennarall Court of Assisses at New York befor the Honorable Governor and Councell; the vallow being under twenty pounds the Court Could not agree weather it was appealeable or not; and soe refered the same untill the next Court; there being some thing dubous in the Testament of the Wittnesses."¹

A competent authority has remarked, "the whole method of practice was rather a dispensation of justice, as the idea of it existed in the heads and was tempered by the hearts of the judges, than the administration of any law written or unwritten."² And yet when we remember that these men were all laymen, pioneers on the border of the wilderness, whose true business was to clear the forests and till the soil, and whose judicial office was a burdensome duty, performed at a considerable sacrifice of time and money in the interest of their little communities, that they were without books or forms and sometimes without blank books in which to write their records, we may wonder that they did so well.³ The justices of these courts as members of the provincial council, as assemblymen, and as judges, played their part in the "Holy Experiment" heralded

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¹ Sussex Records (Turner), 57.

² Smith's History of Delaware County.

³ VII Pennsylvania Archives (2d Series), 777.

in the last entry in the Upland records. This entry, the last official act under the Duke of York's administration, is a notice to the magistrates of the cession of the territory to William Penn and a direction that they should yield due obedience to the new proprietor. Here then it is that the histories of the commonwealths of Pennsylvania and Delaware begin, if commonwealths may be said to have a beginning.

On March 4, 1681, the province of Pennsylvania was granted by King Charles II to William Penn, son of Vice Admiral Penn, to whom a considerable debt was then owing by the Crown.¹ It would be tempting at this point to turn aside and discuss the character and career of the remarkable man who founded the commonwealth of Pennsylvania. Much has been written about him and yet it is doubtful if he has received his real due from history. William Penn was an idealist, perhaps in some respects a visionary man, and yet many of his views were eminently sensible and fundamentally sound. The leader of an exclusive religious sect, the welcome guest at court, the friend alike of James II, of Algernon Sydney and of John Locke, a man of brilliant parts and attractive personality, yet modest, generous, tolerant and forgiving, the nobility of his character as revealed in his writings and conduct is worthy of our highest admiration, little as it was appreciated by those who, like Franklin, owed much of their prosperity to his "Holy Experiment," but could not understand his motives. To his enlightened benevolence and faith in mankind, civilized and savage, was due the early prosperity and progress of the commonwealth. As a German writer has well observed, "Of all the colonies that ever existed none was ever founded on so philanthropic a plan, none was so deeply impressed with the character of its founder,

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¹ Charter and Laws of Pennsylvania, 81.

none practised in a greater degree the principles of toleration, liberty and peace, and none rose and flourished more rapidly than Pennsylvania. She was the youngest of the British colonies established before the eighteenth century, but it was not long before she surpassed most of her elder sisters in population, agriculture and general prosperity."¹

An analysis of the charter granted to Penn belongs rather to constitutional history than to our subject. The English government was daily becoming more impressed with the importance of the colonies in America, and in consequence the document was drawn with more care for the royal prerogative than the earlier charters. One of the most important of its provisions was that requiring a transcript of all laws made and published in the province to be transmitted within five years to the privy council, and if within six months such laws should be declared inconsistent with the king's prerogative or sovereignty, the same should be declared void, otherwise to remain in full force. Penn was given full power to make laws, with the advice and consent of the freemen of the country or their deputies in assembly, to appoint judges, justices and other judicial officers, to pardon crimes, treason and willful and malicious murder excepted, and to "do all and every other thing and things which unto the complete establishment of justice, unto courts and tribunals, forms of judicature and manner of proceedings do belong," and by judges appointed, to award process, hold pleas and determine all actions, suits and causes whatsoever, as well criminal as civil, personal, real and mixed. By three deeds the Duke of York conveyed to Penn the territory covered by the charter and the three lower counties.

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¹ Eberling's History of Pennsylvania quoted in Janney's Life of Penn and 1 Hazard Pa. Reg. 340.

On April 10, 1681, Penn commissioned his cousin, William Markham, to be deputy governor, who arrived on the Delaware about the first of July following. His first act was to call a council and on November 30th we find him holding court at Upland. Prior to this we have the first entry in the records of the Upland Court as part of the province of Pennsylvania.¹ Nine justices are recorded as present. The first cases tried were two cross actions of assault and battery in which all parties were convicted and fined.²

Before sailing for America Penn drew up his famous "Frame of Government," the original manuscript of which, with interlineations and notes in the handwriting of his friends, is preserved in the archives of the Historical Society of Pennsylvania.³ Penn was a close student of political institutions and lived at a time when, in his own words, there was "nothing the wits of men are more busy and divided upon." He like many of his coreligionists had suffered imprisonment for conscience sake. The account of his trial is a fair picture of the administration of justice in the principal criminal court of London during the Stuart period.⁴ When we read those stirring pages we can understand the suspicion with which the courts were regarded by the colonists and their exaggerated faith in trial by jury. Fear of judicial oppression, in fact, had a marked influence on the development of our courts, was instrumental in checking the growth of chancery jurisdiction for several generations and was the primary cause of that jealousy of the judiciary which was long a feature of local politics.

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¹ The justices at New Castle in a letter to the deputy governor at New York dated November 11, 1681, refer to "Pensilvania."

² Hazard's Annals of Pennsylvania, 525.

³ Pennsylvania Historical Magazine, Vol. XXX, 6.

⁴ 6 Howell's State Trials, 951 (1670).

Penn, although he had grown up in a period of political unrest, was eminently practical in his ideas of government. He was a believer in men rather than in methods. In the preface to the Frame of Government he says:—

“But lastly when all is said, there is hardly one frame of government in the world so ill designed by its first founders, that in good hands would not do well enough; and story tells us, the best in ill ones can do nothing that is great or good; witness the Jewish and Roman states. Governments, like clocks, go from the motion men give them, and as governments are made and moved by men, so by them they are ruined too. Wherefore governments rather depend upon men, than men upon governments. Let men be good, and the government cannot be bad; if it be ill, they will cure it. But if men be bad, let the government be never so good, they will endeavor to warp and spoil to their turn.”¹

Under the system of government first established by Penn the executive powers were vested in the governor and provincial council, while the legislative powers were vested in the governor, provincial council and general assembly of the representatives of the freemen of the province. The provincial council was an elective body not only associated with the governor in the ordinary executive duties but also charged with the preparation of all new laws, which after publication,² were to be submitted to the general assembly for approval. Both council and assembly were designed on generous proportions but at the request of the colonists the membership in both bodies was greatly reduced.³ The courts were to be erected by the governor and council, the latter body nominating a double number of candidates

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¹ Charter and Laws of Pennsylvania, 92.

² For form of promulgation, see Minutes of Council, 2, 2 mo. 1686, I Colonial Records, 122.

³ The original Frame of Government as drawn up by Penn was amended at an assembly held at Philadelphia March 1, 1683, Charter and Laws of Pennsylvania, 93, 123. Penn's first plan contained the principle of initiative and referendum.

from whom the governor was to select a proper number for each office. This last provision did not work well in practice, as it was difficult to get enough men of the right sort to fill the commission of the peace, as the minutes of the council clearly show.

It will be seen that the courts, as such, played but a subordinate part in the constitutional system. Indeed the conception of the judiciary as a coördinate branch of the government was as yet unrealized; balanced constitutions were the final products of the eighteenth century, the seventeenth was concerned with the fundamental rights, liberties and privileges of the subject. These rights, as applied in the administration of justice, were embodied in the "Laws agreed upon in England," and published with the Frame of Government. It is therein declared—

"That in all courts all persons of all persuasions may freely appear in their own way, and according to their own manner, and there personally plead their own cause themselves, or if unable, by their friends. And the first process shall be the exhibition of the complaint in court, fourteen days before the trial; and that the party complained against may be fitted for the same, he or she shall be summoned no less than ten days before, and a copy of the complaint delivered him or her, at his or her dwelling house. But before the complaint of any person be received, he shall solemnly declare in court, that he believes in his conscience his cause is just.

"That all pleadings, processes, and records in courts, shall be short, and in English, and in an ordinary and plain character, that they may be understood, and justice speedily administered.

"That all trials shall be by twelve men, and as near as may be peers, or equals, and of the neighborhood, and men without just exception. In cases of life, there shall be first twenty four returned by the sheriff for a grand inquest, of whom twelve at least shall find the complaint to be true; and then the twelve men or peers, to be likewise returned by the sheriff shall have the final judgment. But reasonable challenges shall be always admitted against the said twelve men or any of them.

"That all fees in all cases shall be moderate, and settled by the Provincial Council and General Assembly, and be hung up in a

table in every respective court; and whosoever shall be convicted of taking more, shall pay two-fold, and be dismissed his employment, one moiety of which shall go to the party wronged."¹

These provisions were enacted into law at assemblies held December 10, 1682,² and March 1, 1683.³ Indeed the first and third paragraphs were at the latter session, included among the "fundamental laws" not to be altered without the consent of the governor and six-sevenths of the freemen of the province.⁴ This early attempt to discriminate between the general body of law and certain laws which were regarded as "more essentially requisite" to the well being of the state is of interest to the student of constitutional law. It shows that at this early period the feeling was present that some laws, not necessarily political, ought to be marked out for a special sort of permanence; a feeling that has led to the development of the modern state constitution, absurdly complex and overloaded with non-political details.

Notable, also, are the provisions for the commencement of actions by an informal complaint and for brevity and simplicity in the pleadings and court records, which although in keeping with the primitive local custom were as code provisions a radical departure from the common law, too radical, in fact, to withstand the growth of professional feeling in the eighteenth century. Penn's more liberal contemporaries would not have thought of imposing upon a raw community the artificial system of England in its entirety, but few would have committed themselves to so radical a stand

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¹ Charter and Laws of Pennsylvania, 100.

² Charter and Laws of Pennsylvania, 117.

³ Charter and Laws of Pennsylvania, 128.

⁴ Charter and Laws of Pennsylvania, 154; Reinch's Colonial Common Law, Essays in Anglo-American Legal History, Vol. I, 397.

for permanent reform. As it happened lawyers soon emigrated to the province, bringing with them their cherished technicalities, and the old forms slowly but surely crept into use. Penn, indeed, was too much of a utilitarian to fully realize how deeply even the more cumbersome and fantastic features of the common law were rooted in the habits and customs of the people. We are reminded of his famous colloquy with Mr. Recorder Howell at his trial:—

Penn. "I desire you would let me know by what law it is you prosecute me and upon what you ground your indictment."

Recorder. "Upon the common law."

Penn. "Where is that common law?"

Recorder. "You must not think that I am able to run up so many years and over so many adjudged cases which we call common law to answer your curiosity."

Penn. "This answer I am sure is very short of my question for if it be common, it should not be so hard to produce."

Penn, like Bentham, would seem to have the best of the argument, but a century and a half passed before New York broke the chains of tradition in the code of 1848.

After a "prosperous passage of about two months," Penn arrived before New Castle on the twenty-seventh of October, 1682, and demanded livery of seisin from the commissioners appointed by the Duke of York. The ceremony took place on October twenty-eighth and is thus reported by John Moll:—

"Whereupon by virtue of the power given unto us by the abovementioned letters of attorney, we did give and surrender in the name of his royal highness, unto him the said William Penn, Esq., actual and peaceable possession of the fort of New Castle, by giving him the key thereof, to lock upon himself alone the door, which being opened by him again, we did deliver also unto him one turf, with a twig upon it, a porringer with river water and soil, in part of all what was specified in the

said indenture or deed of enfeoffment from his royal highness, and according to the true intent and meaning thereof."¹

One of his first acts, after taking possession, was to commission six justices of the peace for New Castle and to send out notices for the holding of a court.² At this court, which was attended by several of the council, as well as the justices, Penn delivered an address stating his purpose to call an assembly and recommending the magistrates, in the interim, to follow the laws of the Duke of York. Before the end of the year the province of Pennsylvania was divided into three counties, Philadelphia, Bucks, and Chester (which replaced Upland), and the lower territories into three also, New Castle, as before, while of the two counties into which the Whorekills had been divided, Deal became Sussex, and St. Jones, Kent. The county courts continued as already constituted, and for some time the boards of justices, therein assembled, exercised most of the functions of local government, such as the assessment of taxes, the erection of jails, the allotment of land to settlers and the abatement of public nuisances.³ The number of justices in any county varied from time to time with the pressure of business, the willingness or ability of those chosen to perform their duties or the favor of the council. Sometimes a man of importance was commissioned as justice for the whole province.

Under the Duke of York's laws the attendance of the justices was enforced by a fine of ten pounds for every day's absence, and there are entries of such fines in the records of the courts.⁴ Under the Act of May 10, 1685,

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¹ Hazard's Annals of Pennsylvania, 606, quoting Records of Court of New Castle, Recorder's Office, B. 9, 407.

² Hazard's Annals of Pennsylvania, 596.

³ Charter and Laws of Pennsylvania, 233, 237; Pennypacker's Colonial Cases, 78, 92; Sussex Records (Turner), 55, 83.

⁴ Charter and Laws of Pennsylvania, 3, 176; Upland Court Records, 189.

(ch. 176) the same policy was continued, but the fine reduced to thirty shillings. When possible the justices were assisted by the presence of the governor, members of the council or judges of the provincial court, after its establishment, all of whom were *ex officio* of the commission of the peace. In the minutes of the court of Bucks County it is noted that on the 4th and 11th day, 1 mo., 1683, the governor, William Penn, was present and held an orphans' court. The county courts with their vague and indefinite jurisdiction in civil and criminal causes and county affairs would seem to have been regarded with favor by Penn, who was averse to complicated procedure; hence at the first assembly held at Chester, December 7, 1682, there is little said of the courts, although in the "Great Body of Laws" then adopted will be found most important modifications of the common law both as to persons and property.¹

At the session, in March, 1683, it was enacted that in every precinct three persons should yearly be chosen as common peacemakers, to whom differences might be submitted for arbitration and whose findings should be as conclusive as those of the county court. In the minutes of the provincial council, 7th, 9 mo., 1683, will be found a case "referred to the peacemakers and in case of refusal to the County Court."² Voluntary arbitration was then an accepted method of settling disputes in England, particularly in cases involving merchants' accounts, enforced by bond conditioned to submit to the award, and arbitration, by rule of court,

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¹ Lands were made liable for debts "except where there was issue and then one half of the land," the principle of set-off was accepted, the recording of deeds regulated and a mild criminal code adopted. Charter and Laws of Pennsylvania 109, 118.

² I Colonial Records, 34, 7, 9 mo., 1683; see, also, Sussex Records (Turner) 97, 116, for the election of peacemakers.

was adopted by Statute 9 and 10 William III, ch. 15. We have also seen that from the earliest period the practice prevailed in New York and its dependencies. The office of peacemaker, however, seems to have survived only until 1692 when the assembly decided that the law was not in practice. Arbitration was long a popular method of trying cases and beginning with the Act of January 12, 1705,¹ a law for reference by rule of court in the spirit of the statute of William III, there is a long series of acts perfecting this method of disposing of litigation. The early dockets of the supreme and common pleas courts are full of rules for references and voluntary submissions.

At the session of 1683 it was enacted that the first process in every suit should be the exhibition of a complaint *fourteen* days before trial, that the defendant should be summoned *ten* days before trial and furnished with a copy of the complaint, which was required to be delivered to him at his dwelling house. The jurisdiction of the county courts was also more clearly defined.

"That all actions of debt, Accompt, or Slander, and all actions of Trespass, shall be henceforth first tryed by there respective County Court, where the Cause of action did arise.

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¹ II Statutes at Large, 242. The Society of Friends had regulations of their own for submitting all differences between members to their monthly meetings. See the publications of the Genealogical Society of Pennsylvania, Vol. IV, 141. In 1707 James Logan writes to William Penn: "William Rakestraw has had me before the meeting for not granting him the lot near the bridge, after Francis Plumstead had applied to thee for it, and, as he pretends here, got a grant for it; but the six Friends to whom it was referred, declared it as their sentiments, upon a full hearing, that William has no manner of claim to it, either in law or equity, but that he has had full satisfaction, and shall condemn and retract his abuse against thee especially, of which shall send copies when past in the meeting." *Memoirs of Historical Society of Pennsylvania*, Vol. X, 258. The Statute of William III would seem to have been first suggested by John Locke. *Board of Trade Journal*, December 18, 1696 (*Mss. Historical Society of Pennsylvania*, Vol. IX, 288).

"And if any person shall think himself aggrieved with the Judgement of the County Court, That then, such person may Appeal to have the same tryed before the Governour and Council; Provided always that the same be above twelve lbs. And that the person appealing, do put in good, and sufficient Security, to pay all Costs and Damages, if hee shall be cast, as also to pay the Cost and Charges of the first Suit."¹

The legislative activity of Penn and the assembly during the early days of the colonization of Pennsylvania was such as to render it difficult to follow all the changes in procedure. No colony started with a more complete and original code, but much was necessarily experimental and was gradually modified under the influence of practical experience. The change in the dynasty and the political vicissitudes of the proprietor were also disturbing elements and an atmosphere of uncertainty surrounds much of the legislation prior to Penn's second visit to America. In 1693, when Penn's government was suspended and Governor Fletcher of New York in charge, an investigation showed the rolls of the laws in confusion and not passed under the great seal. There was no certain evidence either that they had been transmitted to the privy council for approval, although David Lloyd and John White stated that they knew that Penn had delivered some at least of the laws to the king in council.² In 1694 some of the laws were

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¹ Charter and Laws of Pennsylvania, 129.

² Minutes of Provincial Council, May 24, 1693, 1 Colonial Records, 379, 380. Penn under date of 25, 7 mo. 1689, instructed Deputy Governor Blackwell "to collect y^e Laws that are in Being, and send them over to me in a sticht book, by y^e first opportunity, which I have so often and so much in vaine desired." 1 Pennsylvania Archives (4th Series), 106; 1 Colonial Records, 276, 2, 11 mo. 1689-90. It would seem that Penn had contemplated periodic revisions of the whole code, 1 Colonial Records, 42, 24, 1 mo. 1684; 151-2, 1, 2 mo. 1687; letter of Penn to Council, Pennsylvania Magazine of History, Vol. 33, 308; Chapter 142 of the Acts of 1683, Charter and Laws of Pennsylvania, 155.

sent over, for on August first of that year Penn appeared before the committee on trade and plantations and objected to the act about recording deeds. On the third of August following the attorney-general gave his opinion on the acts and the committee agreed to approve of nineteen, to repeal two and to hold five until the general assembly had given them further consideration. From the titles, which alone are given in the journal of the board of trade, the acts referred to are apparently those passed in 1693 under Governor Fletcher and include one "about appeals to the Supream Court."¹ On December 31, 1697, Penn laid some more laws before the commissioners of trade² but the minutes do not state what they were or what action was taken on them. However, this much is certain, that in their more general provisions these laws were recognized and to some extent observed, but the unsettled political conditions, brought about partly by the absence of the proprietor after 1684 and the English revolution of 1688, led to confirmations, reënactments and repetitions of statutes in varying phraseology, which must have caused confusion, particularly as the laws were not at this time allowed to be printed, manuscript copies being filed in the county courts with the president or clerk.³ Hence, the

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¹ Journal of the Board of Trade (Mss. Historical Society of Pennsylvania, Vol. VII, 309), August 3, 1694.

In 1694 the speaker informed the house that the laws passed by the last assembly, and transmitted to the king and council, were lodged with the king's attorney, "who expects twenty guineas for perusing them, so that the same are not disallowed." I Votes of Assembly, 82, 25, 3 mo. 1694.

² Journal of the Board of Trade, December 31, 1697, Vol. X, 386.

³ I Colonial Records, 18, 23, 3 mo. 1683. The jurisdiction of the courts prior to 1700 has been admirably described by the late Lawrence Lewis, Jr., Esq., in a paper read before the Historical Society of Pennsylvania March 14, 1881, and reprinted in I Pennsylvania Bar Association Reports, 353.

text of acts passed before 1700 must be accepted with considerable reserve and it is difficult to determine just how far the more experimental features were enforced.

The county courts were vested with criminal jurisdiction in all except such important crimes as treason, murder and manslaughter and, after 1693, burglary, rape and arson. At times, however, a special commission of oyer and terminer was issued to some of the justices to try a special offender or to clear the jail. The offenses for which indictments were most frequently found and trials had were for drunkenness, larceny, profanity, assault and battery and breach of the peace, offenses against morality, "selling rum to the Indians," speaking disrespectfully of the magistrates and breaking the Sabbath. In the lower counties there are occasional arrests on suspicion of piracy and smuggling. The following entry in the Chester County court records carries a faint echo from Monmouth's Rebellion:—

"Ordered that the sheriff take into his custody the body of David Lewis upon suspicion of treason, as also the body of Robert Cloud for concealing the same; for that he the said Robert Cloud being attested before this court, declared that upon the 3d day of the weeke before Christmas last at the house of George Foreham, the said David Lewis did declare in his hearing that he was accused for being concerned with the Duke of Monmouth in the West Country."¹

On the civil side the practice at this period did not differ materially from that under the Duke of York, although there is a gradual improvement in the forms and methods of procedure and in the use of legal terms, as the courts acquired experience or became better

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¹ Chester County Records, 6th, 8 mo. 1685; 5 Hazard's Pennsylvania Register, 156. The case of *Cock v. Rambo*, Penny-packer's Colonial Cases, 79, is an illustration of the practice in a criminal case from the binding over to final judgment.

informed as to their duties through the importation of law books into the province. Although without legal training, the justices lived in a time when a knowledge of the rudiments of the law and the ordinary forms of conveyancing were essential to a gentleman, or merchant of importance, and a copy of Dalton's *Justices* with the acts of assembly would meet most of the requirements of a rustic community. Some at least of the justices were drawn from the same class as supplied the quarter sessions in the rural districts of England.

A difficulty seems to have confronted them in properly upholding the dignity of the courts. A rule of the Philadelphia County court for 1686, after reciting that many disorders had been committed in the courts of this county, partly through ignorance and partly through negligence of otherwise well-meaning persons, goes on to order—

"That plfs, dfts, and all other psons speake directly to the point in question, & yt they put in their pleas in writing (this being a Court of record) & that they forbear reflections & recriminations either on the Court, Juries or on one another; under penalty of a fine."¹

Nor were the judges always free from fault themselves. Justice Luke Watson of Sussex County was in 1684 twice fined by his colleagues for "smoakin tobacco in the Court house,"² the first time fifty and the second time one hundred pounds of tobacco, an instance where the punishment certainly fitted the crime. Another

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¹ Pennypacker's *Colonial Cases*, 99. In the previous year Thomas Howell was fined one shilling for breach of a rule. "Hee saucilie ansered Let the Court gett it how they can."

² Sussex County Records (Turner), 109. Watson was expelled from the provincial council in 1686, I *Colonial Records*, 129, 10, 3 mo. 1686, but reinstated, I *Colonial Records*, 177, 10, 3 mo. 1688.

justice was fined five shillings for swearing.¹ In the same county in 1687 one Thomas Jones refused to attend court when summoned and a constable and two justices were sent to fetch him, whom he roundly cursed. The record adds:—

“The said Jones being brought to the Court, the Court told him of his misdemeanor, and told him he should suffer for it; he told the Court he questioned their power, soe the Court ordered the Sheriff and Constable to secure him and they carryed & dragged him to ye smith shop where they put irons upon him, but he quickly got the Irons off and escaped, he having before wounded several persons’ legs with his spurs that strived with him, and when they was goeing to put him in the Stocks, before that they put him in Irons, he kicked the Sheriff on the mouth and was very unruly and abusive, and soone got out of the Stocks.”²

The grand jury of Philadelphia County in 1686 presented Justice James Claypoole “for endeavoring by an indirect way to prepossess Judge Moore in a case yt was to be tryed before him in the provinciall court, being by us lookt upon to be of a dangerous Consequence,” and “for menacing and abusing ye jurors in ye triall of John Moon which was an infringement of ye rights and properties of ye people.”³

In the trial of cases the procedure was characteristically simple. If the plaintiff failed to serve his process he was nonsuited; if the defendant failed to appear judgment was entered against him. If both parties were present the defendant was called on for his answer, which could set up any defense legal or equitable or claim a set-off.⁴ The law required the pleadings to be

¹ Sussex Records (Turner), 110. He could have cited year-book precedents in his favor.

² Sussex County Records Mss., quoted I Pennsylvania Bar Association Reports, 361.

³ Pennypacker’s Colonial Cases, 116 (1686).

⁴ See *Reynolds v. Simpson*, Pennypacker’s Colonial Cases, 77 (1685).

short and in English. The parties would sometimes leave the case to the bench without a jury,¹ particularly in the lower counties, but if a jury was called, it consisted invariably of twelve men. After verdict judgment was entered and the practice survived for some time of entering judgments in kind—perhaps reaching a climax in an entry of judgment for “one thousand of six-penny nails, and three bottles of rum.”²

As to process of execution, we know little except that the proceedings would seem rather summary. An order of council was made in 1686 “yt there should be tenn days Respite between judgm^t given in ye County Courts within this Province and Territoryes in all Civill Causes, and signing the execution thereof, and that in the Prov^l Court no Execution shall be served until eight days after judgm^t given.”³ To this the assembly in 1687 made strenuous objection and urged that the order be revoked, whereupon the council decided to leave the matter to the discretion of the courts.⁴ There are recorded several petitions to the council for relief against executions on judgments entered by default, and others for relief against vexatious and oppressive executions. In one of these a widow complains that judgment having been obtained against the estate of her deceased husband, the sheriff had levied on the

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¹ In *Proprietor v. Wilkins*, Pennypacker's Colonial Cases, 89 (1685-6), a criminal case in Philadelphia, after the defendant had elected to be tried “by the bench of justices without a jury,” Hersent, the attorney-general, contended that it was contrary to law to try a prisoner without a petit jury. His contention was overruled, but the prisoner was convicted and fined.

² Sussex County Records Mss., quoted I Pennsylvania Bar Association Reports, 364.

³ I Colonial Records, 122, 2, 2 mo. 1686.

⁴ I Colonial Records, 157, 158, 11, 3 mo. 1687. In Philadelphia the practice was for the justices to sign the order for an execution. Pennypacker's Colonial Cases, 108; so, also, in the provincial court, I Colonial Records, 95, 11, 5 mo. 1685.

plantation where she and her children dwelt, although there was sufficient property elsewhere to satisfy the debt. The council sent for the sheriff and told him that if there were other effects of the decedent he ought not to levy on the plantation where the widow and children lived.¹ In other cases relief seems to have been given on account of the poverty of the defendant, a practice that would pave the way for the debtor's exemption law.²

In criminal cases the sentences were usually limited to fines, whippings or the stocks. Sentences to terms of imprisonment were rare; the colony could ill afford to spare the labors of any individual, however depraved, and still less was it inclined to support him in idleness. Penn's incarceration in Newgate had familiarized him with the evils of prison life and he expressly ordained that prisons should be workhouses.³ Such prisons as were built at this time were neither particularly commodious nor strong. In 1688 the council found it necessary to reprimand the sheriff of Sussex for permitting a dangerous prisoner to be at large. The prisoner magnanimously sent word to the council that he would yield himself up rather than "ye sheriff should suffer."⁴ A similar reprimand was administered to the sheriff of Philadelphia for permitting two prisoners suspected of piracy to go at large, to which the sheriff replied, that they never went without his leave and a keeper, "w^{ch} hee thought might have been allowed in hott weather."⁵

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¹ I Colonial Records, 124, 9, 2 mo. 1686.

² I Colonial Records, 125, 9, 2 mo. 1686, also pages 153, 156, 161.

³ Charter and Laws of Pennsylvania, 100.

⁴ I Colonial Records, 199, 21, 12 mo. 1688-9.

⁵ I Colonial Records, 531, August 8, 1699. Part of Patrick Robinson's house seems to have been used as a prison. Watson's Annals of Philadelphia (1850), Vol. I, 356.

By the Act of March 1, 1683,¹ the justices of the county courts were required to sit twice a year as an orphans' court. The name as well as the original purpose of this court was derived from the court maintained by the corporation of London, which, by immemorial custom, had charge of the estates of orphans of freemen of the city. The practice and jurisdiction of the court, which will be discussed later, differed from that of its prototype but was not distinctly settled at this time, and we find the provincial council taking cognizance of matters that subsequently were assigned to this tribunal or to the register's court, such as the appointment of administrators, and sale of land for debts.

Prior to 1684 there existed in the province no tribunal having cognizance of appeals other than the provincial council, which, in some degree, supplied the place of the general court of assizes under the Duke of York's Laws. As the colony grew, the ever increasing number of appeals took up more and more of the council's time and made this duty exceedingly burdensome, not to speak of the inconvenience to the suitors in traveling to Philadelphia with their witnesses for a hearing *de novo*. To remedy this inconvenience the Act of May 3, 1684², was passed, which provided that there should be five provincial judges, appointed by the governor, any three of whom should form the provincial court and sit twice a year in Philadelphia, while two of them should every spring and fall go on circuit into every county and there hold court. The court was to hear and determine all appeals from inferior courts and all causes, criminal and civil both in law and equity not determinable in the county courts. In 1685 the number of judges was reduced to

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¹ Charter and Laws of Pennsylvania, 131.

² Charter and Laws of Pennsylvania, 168.

three, but the original number was restored by the Acts of 1690 and 1693.¹ A commission was accordingly issued by Penn to five judges, of whom Nicholas Moore was named first, the commission to be in force for two years.² The law did not fix any definite period for service and the commissions were drawn for various periods. In one instance it is noted in the minutes of the council that the commission is to continue "only for this present court."³ Jealousies quickly arose as to the geographical apportionment of the judges and in 1687 the assembly requested that at least one of the judges be named from the lower counties.⁴ In 1690 the appointment of the judges caused a split in the council, the members from the lower counties objecting to the naming of but one judge from the territories and also demanding that, according to what they stated was the proprietor's example, two commissions issue, one for the province and one for the counties, so that each would have a chief justice from its own district. Unable to prevail on their colleagues, the members from the lower counties held a separate meeting and drew up commissions to suit themselves.⁵ The keeper of the great seal, however, refused to seal these commissions and at a regular meeting of the council, subsequently held, the action of these members was denounced as irregular and annulled. This was the first open manifestation of the dissatisfaction of the territories with the union with Pennsylvania, which continually increased until a separate government was obtained.

The provincial court did not at once command or obtain the respect and influence due to the chief judicial

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¹ Charter and Laws of Pennsylvania, 178, 184, 225; I Colonial Records, 205, 26, 12 mo. 1688-9.

² I Colonial Records, 68, 12, 7 mo. 1684.

³ I Colonial Records, 290, 10, 2 mo. 1690.

⁴ I Colonial Records, 157, 11, 3 mo. 1687.

I Colonial Records, 304, 21, 9 mo. 1690.

tribunal of the colony. It was founded in the most trying times, when political dissensions among the leading colonists and war and revolution in England distracted the province. The terms of office were irregular, the compensation wholly inadequate and the journeys on circuit tedious and even dangerous. It is not to be wondered at that it was difficult to induce properly qualified men to accept a place on the bench and that nominees for that honor sought excuses to decline the office. No traces of the records and opinions of the court at this time have come down to us and they cannot have been bulky, for, when the council in 1688 sent for the records, they were informed by the clerk that "they were not recorded otherwise than in a quire of paper."¹ The duties of the judges did not at first compel them to grapple with legal problems with a view to the value of their decisions as precedents. The correction of errors arising on issues of fact and the trial of the more serious crimes probably made up the bulk of the business. As time went on the court strengthened its position, and appeals to the council became less and less frequent, until in the early eighteenth century the two bodies, executive and judicial, assumed their normal functions.

It is sad to relate that Nicholas Moore, the first chief justice of the provincial court, was impeached by the assembly within a year after the creation of the court. Moore was a physician as well as president of the Society of Free Traders and a large purchaser of land from Penn. Although not a Friend he immediately obtained a position of influence, was elected to the assembly and was speaker in 1684. While capable and energetic he lacked tact and discretion and assumed an arrogant tone which offended his fellow members of the assembly

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¹ I Colonial Records, 202, 25, 12 mo. 1688-9.

and gave still greater offense after his elevation to the bench. In the minutes of the assembly there are numerous instances of his interruptions and protests during the consideration of bills.¹ It was reported to the council, during the session of 1684, that the speaker had said: "The proposed laws were cursed laws" and "hang it Damn them all."² The principal complaints against his conduct on the bench seem to have come from the lower counties. Ten formidable articles of impeachment were presented, among which were the following:—

"The said Nich. Moore, Judge, having that high Trust Lodged in him for the Equall Distribution of justice, without respect of Persons, the said Judge Sitting in Judgmt at New Castle, hath presumed to cast out a person from being of a Jury, after ye said Person was Lawfully attested to ye True Tryall of ye Cause, thereby rending an Innocent & Lawful Person Infamous in the face of the County, by rejecting his attestation after Lawfully Taken, and Depriving the plantif of his just Right.

"The said Nich. Moore, Sitting in judgmt, did in ye towne of New Castle, refuse a verdict brought in by a Lawfull Jury, and by Divers threats & Menaces, and Threatening ye jury with ye same of Perjury and crim of their Estates, forced ye said Jury to goe out so often—until they had brought a Direct Contrary verdict to the first, There, by preventing justice, and wounding the Libertyes of ye free people of this Province and Territories in the Tenderest point of their Privelege, and violently Usurping over ye Consciences of the Jury.

"The said Nich. Moore assuming to himselfe an Unlimited and unlawful Power, did, Sitting in Judgmt at ye aforesaid Towne of New Castle, wherein two persons stood Charged in a Civil action, it being in its own Nature only Trover & Conversion, and ye pretended Indictmt raised it no higher, notwithstanding the said Moore did give the judgmt of felony, Comending the Defendant to be Publickly Whipt, & Each to be fined to pay three fould, thereby Tyranizeing over the persons, Estates

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¹ See Votes of the Assembly, Vol. I, 32.

² I Colonial Records, 55, 17, 3 mo. 1684.

and reputations of the people of this Province and Territories, Contrary to Law and Reason.

"The said Nich. Moore, Sitting in judgment at Chester, did in a most Ambitious, Insulting, & Arbitrary way, reverse and Impeach the judgment of ye Justices of ye said County Court, and Publickly affronting the members thereof, although the matter came not regularly before the said Circular Court, thereby drawing the Magistrates into the Contempt of ye people, and Weakening their hands in the administration of justice."¹

A committee of five was appointed to manage the impeachment, one of whom was Abraham Mann, whom we have previously seen engaged in the prosecution of Justice Moll before the court of assizes in New York. The council showed little disposition to further this impeachment but treated the accusers with due civility and fixed a time for the hearing. Moore, however, was by no means inclined to submit tamely to the proceedings, and in the house, of which he was still a member, accused Abraham Mann of being "a person of seditious spirit," in which he was probably right. The house, however, expelled Moore and proceeded to collect evidence for the prosecution. They met with a decided obstacle in the conduct of Patrick Robinson, clerk of the court, who declined to produce the records of the court, declaring that they were "written in Latin where one word stood for a sentence, and in unintelligible characters which no person could read but himself, no, not an angel from Heaven."² But this did not end his offenses; he declared the articles of impeachment were drawn "hob nob at a venture" and threatened to "have at" the speaker when he was "out of the chair." The house issued a warrant for Robinson's arrest and requested

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¹ I Colonial Records, 83, 15, 3 mo. 1685; Votes of the Assembly, Vol. I, 35; Charter and Laws of Pennsylvania, 499.

² Those who have had occasion to read his handwriting will testify to the truth of this statement.

the council to remove him from office. From the hearing on the impeachment Moore contemptuously absented himself, but the evidence was thought sufficiently grave by the council to suspend the judge from his official functions until the matter was finally decided. The council showed every disposition to treat Moore with leniency, although it had been testified that he had called the members thereof "fooles and Logerheads, and said it were well if all the Laws had drapt and that it would never be good Times as Long as ye Quakers had the administration." Knowing the proprietor's predilection for Moore the house addressed a letter to Penn on the subject, a quotation from the last paragraph of which shows that in spite of their quarrels and jealousies they still regarded him with affection.

"Dear and honored Sir, the honor of God, the love of your person, and the preservation of the peace and welfare of the government, were, we hope, the only centre to which all our actions did tend, and although the wisdom of the assembly thought fit to humble that aspiring and corrupt minister of state, Nicholas Moore, yet to you, dear sir, and to the happy success of your affairs our hearts are open, and our hands ready at all times to subscribe ourselves, in the name of ourselves and all the freemen we represent, Your obedient and faithful freemen.

JOHN WHITE, Speaker."¹

By one excuse after another the council prevented further proceedings in the impeachment until the matter was lost sight of in the discussion of more important and perplexing affairs of state which soon required attention.

The provincial council, although not strictly a court, for a long time exercised judicial functions and, through the fortunate preservation of its minutes, is by far the best known of the early tribunals. The exercise of

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¹ Janney's Life of Penn, 278.

judicial functions by the governor and council was strictly in accordance with the custom in other proprietary and royal provinces, and that judicial and executive functions were found incompatible in Pennsylvania so early in its history is a clear indication of the rapid growth of a democratic and progressive spirit in that province.

The extraordinary growth of the colony, the long absences of the proprietor in England and the large measure of self-government which the citizens enjoyed, threw upon the council an amount of executive business which made judicial duties particularly onerous, and numbers of petitions and appeals were referred back to the courts. Aside from their judicial duties the governor and council, as an executive body, appointed the judges and magistrates, regulated commerce, conducted negotiations with the Indians and the other colonies, subdivided counties, laid out towns, established fairs and markets, ordained the principal highways, bridges and ferries, and exercised a general supervision over local administration. As a legislative body, they drew up all the laws, prior to 1693, when that right was assumed by the assembly, being finally transferred to that body by the Frame of Government of 1701. By that instrument also, the council, no doubt to its great relief, was expressly deprived of judicial functions.

During the first twenty years of its existence the amount of judicial business transacted in the council was large; prior to the establishment of the provincial court it was the only general tribunal and was not only a court for hearing appeals but also a court of first instance for such suitors as could obtain a hearing before it. This, of course, was natural at the first settlement, as a matter of practical necessity. We therefore find in the early part of the minutes, trials for

petty offenses and the collection of small debts. They seem to have been obliged even to discipline their own members, for at the fifth meeting of the council one of its members was fined five shillings "for being disordered in Drink."¹ The council seems to have exercised its good offices in composing differences. In 1684 there is the following entry:—

"Andrew Johnson Pl. Hance Peterson Deft. There being a difference depending between them, the Govr. & Council advised them to shake hands and to forgive One another. And Ordered that they should Enter in bonds for fifty pounds apiece, for their good abearance; which accordingly they did. It was also Ordered that the Records of Court concerning that Business should be burnt."²

There are other cases where the council would seem to have acted more as a final board of arbitration than as judges in the strict sense.³

Prior to the establishment of the provincial court in 1684, the council heard all appeals, and although after that time such appeals were discouraged, they nevertheless continued to be brought before the council for some years. Besides regular appeals, there were numerous petitions for executive clemency, complaints against severe sentences in criminal cases and, in civil cases, petitions for relief against judgments entered by default and against executions which bore too severely on the debtor. In one early case, on appeal from the county court of Philadelphia, it was shown to the council that the case concerned the title to land in Bucks County, when the law required cases to be tried where the cause of action arose. The council remitted the case to the court of Bucks County and fined the Philadelphia court "forty pounds for giving judgment against law."⁴

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¹ I Colonial Records, 4, 15, 1 mo. 1683.

² I Colonial Records, 52, 13, 3 mo. 1684.

³ I Colonial Records, 65, 14, 6 mo. 1684.

⁴ I Colonial Records, 20, 20, 4 mo. 1683.

As an illustration of the practice on appeal to the council the case of *Grantham v. Wollaston*¹ may be cited:—

One Wollaston purchased a negro from Grantham and gave a bond for £26, 15 s. in payment. Judgment was entered on this bond by the New Castle County court, execution issued and a portion of the defendant's land sold by the sheriff to Grantham for £30, 10 s. and the latter was put in possession. Wollaston on the 18th, 3 mo., 1687, petitioned to the council at Philadelphia averring that the county court had denied him an appeal to have his case heard in equity. After reading a copy of the proceedings the council directed the secretary to take security for the prosecution of the appeal at the next provincial court and ordered the county court to stop all proceedings. The provincial court on the 10th, 2 mo., 1688, made an order restoring Wollaston to possession, which, it was explained later by one of the judges, was not intended to be executed "until the debt and damages were satisfied." On the 7th, 12 mo., 1688-9, Wollaston again petitioned the council, complaining of a forcible entry and detainer, whereupon it was resolved that a warrant be drawn, directed to the justices of the peace dwelling "nearest to ye place where ye fforce is alleaged," to make a view and, if they found no force, to require the sheriff to summon a jury to inquire into the facts and thereupon to imprison the offender and restore quiet possession to the petitioner. On March 4, 1688-9, the clerk of the county court returned to the council the finding of the jury, which was in effect that Grantham had been the victim of the forcible entry. "This was judged by ye board to be a great affront and contempt of their author-

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¹ I Colonial Records, 161, 18, 3 mo. 1687, and see pages 172, 193, 210, 215-18.

ity." Grantham's wife then petitioned the council setting forth her husband's side of the case, and the assembly also remonstrated against the action of the provincial court and requested the council to rehear the whole matter "as the supreme judges of this government." Governor Blackwell and the council, accordingly, proceeded to New Castle where, on March 13 and 14, 1689, the facts were again reviewed. Both parties were called in and "endeavors used with both of them to agree the matter between themselves," but in vain. Wollaston declared he had better be without the land than pay £30, 10 s. for it, and on the other hand Grantham refused to take back the negro, contending justly that the defendant had had several years' use of his purchase while the plaintiff had been out his money. The council thereupon resolved and ordered that the sheriff's sale to Grantham should be confirmed and that he should be restored to possession, that this should be in full of all demands against Wollaston, debt, damages and charges, and "that this be the final conclusion & judgement of this board in that case."

It has been observed that the judicial powers exercised by the council resembled those wielded by the court of star chamber in its purest and best days,¹ but however beneficial such control was in correcting the errors of an amateur judiciary, it was contrary to the constitutional principles then uppermost in English minds after a century-long struggle with absolutism. Accordingly, when the revision of the Frame of Government was under consideration in 1701, the assembly petitioned that no person should be answerable before the governor and council or in any place but an ordinary court of justice.² Penn replied that he knew of no per-

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¹ McCall's address before the Law Academy (1838); I Pennsylvania Bar Association Reports, 386.

² II Colonial Records, 34, 20, 7 mo. 1701.

son obliged so to answer,¹ but he inserted the following clause in the new charter:—

“That no person or persons shall or may, at any time hereafter, be obliged to answer any complaint, matter or thing whatsoever Relateing to Property before the Govern^r and Council, or in any other place but in the ordinary Courts of Justice, Unless appeals thereunto shall be hereafter by Law appointed.”²

The council was also the only court for the trial of serious crimes until 1685, when that jurisdiction was conferred on the provincial court. Important cases of this kind were those of the Proprietor against Pickering for counterfeiting³ and against Margaret Mattson⁴ for witchcraft. The latter case is peculiarly interesting as illustrating the superstition of the times and in its outcome was most creditable to the common sense of Penn and the jury. The accusation against the woman was that she had bewitched the witness's cattle, but the evidence was mostly hearsay, as the defendant herself cleverly pointed out. The verdict of the jury was: “Guilty of haveing the Comon fame of a Witch, but not Guilty in manner and forme as Shee Stands Indicted.” The defendant was permitted to go, on entering bond for good behavior. The fear of witchcraft did not disappear for some time in Pennsylvania. In 1695, the grand jury of Chester County presented “Robert Roman of Chichester for practising Geomacy according to Hidon and Divining by a Stick.” The accused submitted to the court, was fined five pounds and ordered “never to practice the arts” but behave himself well, which he promised. His books, “Hidon's Temple of Wisdom,”

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¹ II Colonial Records, 38, 29, 7 mo. 1701.

² II Colonial Records, 56, 28, 8 mo. 1701.

³ Pennypacker's Colonial Cases, 32; I Colonial Records, 29, 24, 8 mo. 1683, and page 32.

⁴ Pennypacker's Colonial Cases, 35; I Colonial Records, 40, 27, 12 mo. 1683.

"Scot's Discovery of Witchcraft," and "Cornelius Agrippa's Necromancy," were ordered to be brought into court.¹ Another accusation of witchcraft was brought to the attention of the council in 1701 but dismissed as trifling.

The jurisdiction of the council in admiralty matters was a source of much trouble to them.² There are numerous cases in the minutes relating to seamen's wages, pilots' fees, violations of the navigation laws and complaints against masters for ill treatment of passengers. An example of the last is the case of *March v. Kilner*³ where the master of the ship was charged with beating the passengers and permitting the crew to drink their beer. Kilner denied everything, "only ye kicking of the maid." He was reprimanded and advised to "make up the business w^{ch} accordingly he did." The proprietor was, by his charter, personally charged with the duty of seeing to the enforcement of the English navigation acts and that fines and duties were imposed and collected according to that complicated and, as the colonists thought, burdensome system. The responsibility for the execution of these laws rested upon the council and many were the complaints to the home government of their indifference and laxity in these matters. Indeed Penn was obliged to write to them in 1697 urging the enforcement of the laws and stating that it had been reported to him "that you doe not onlie wink att but Imbrace pirats, ships and men."⁴ The

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¹ Hazard's Pennsylvania Register, Vol. V, 159. In Sussex County Edward Southrin was accused of having conversed with the devil. Sussex County Records (Turner), 36.

² I Colonial Records, 8, 21, 1 mo. 1683, and pages 35, 69.

³ Pennypacker's Colonial Cases, 29; I Colonial Records, 23, 7, 7 mo. 1683.

⁴ I Colonial Records, 494, 9 February, 1697-8; Board of Trade Journals, Mss. Historical Society Pennsylvania, Vol. X, 268, 287, 333.

council indignantly denied this accusation and reported:—

“Wee know of none that has been entertained here, unless Chinton & Lassell, with some others of Avery’s Crew, that happened for a smal time to sojourn in this place, as they did in some of the neighboring governments; but as soon as the magistrats in Philadelphia had received but a Copie of the Lords Justice’s proclamation, gott all that were here apprehended, & would have taken the Care & Charge of securing y^m, untill a Legall Court had been erected for their trial, or an opportunity had presented to send y^m to England; but before that Could be effected, they broke goale & made their escape to New York, where Hues & Crys wer sent after y^m.”¹

Nevertheless the records of the time are full of references to piracy, and Pennsylvania was reported to have “become ye greatest refuge & Shelter for pirats & Rogues in America.” Undoubtedly the “pirats and rogues” took advantage of the mild temper and humanity of the Quaker justices. In 1698 the town of Lewes was plundered, a woeful account of which is contained in a letter from the local justices to Lieutenant-Governor Markham, and in 1700 it was reported to Penn that the great Captain Kidd was lying off Cape Henlopen and trading with some of the inhabitants.²

To deal with such matters, a court of vice admiralty was established, by the Crown, for Pennsylvania and the territories in 1697, of which Colonel Robert Quarry was appointed judge. Quarry was a former governor of South Carolina, a vain and quarrelsome person who disliked the Friends and was bitterly opposed to the

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¹ I Colonial Records, 495, 10 February, 1697–8.

² I Colonial Records, 532, August 9, 1699 and see page 549; Sussex Records (Turner), 42. August 17, 1696, Mr. Randolph delivered to the Commissioners of Trade a paper relating to the ill execution of the Acts of Parliament and a list of names of Pirates and Scotchmen inhabiting and trading in Pennsylvania; Memoirs of Historical Society of Pennsylvania, Vol. IV, part 2, 260.

proprietary system of government. Almost immediately after his appointment his court came into conflict with the county court of Philadelphia. Certain goods having been seized by the collector of customs under a warrant issued by Colonel Quarry, a judge of the county court at the instance of David Lloyd, a lawyer and member of the council, granted a writ of replevin under which they were taken from the collector. Quarry was exceedingly indignant at this and complained both to the home government and to the governor and council, who made such apologies as they could, handed over the replevin bond to him, and reprimanded the judge, who tendered his resignation.¹ David Lloyd, however, was as obstinate and hot-headed as Quarry himself. At the succeeding county court he brought an action against the marshal for the detaining of the goods. In the words of Quarry—

"Ye marshall being called to defend the sute, hee produced in his owne Justificaon His maties Lres pats, undr ye broad seal of ye High Court of Admiraltie, with the Judges warrt for ye seizure aforesaid, which sd patent having in the frontis piece his most sacred maties effigies stamp, with the sd seal adpendant, the sd David Lloyd, in a most insolent & disloyal manner, taking the sd Commission in his hand & exposing it to ye people, did utter & publish these scurilous & reflecting words following, viz:—what is this? do you think to scare us wt a great box (meaning ye seal in a tin box) and a little Babie; (meaning ye picture or effigies aforesaid); 'tis true, said hee, fine pictures please children; but wee are not to be frightened att such a rate; & many more gross & reflecting expressions on his matie to ye like effect."²

For this and other insults to the court of admiralty, Penn, by order of the board of trade, suspended Lloyd from the council and dismissed him from all public

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¹ I Colonial Records, 535, December 21, 1699, and see page 545.

² I Colonial Records, 576, May 14, 1700.

employment and he from that time became a bitter opponent of the proprietor.¹ Nevertheless in spite of stringent laws and a more systematic patrol of the coast by cruisers it was long before pirates ceased to be a menace to commerce. In 1712 Logan wrote, "We have been extremely pestered with pirates who now swarm in America and increase their numbers with every vessel they take."² In 1718 Governor Keith in calling the council's attention to the losses sustained by the colony through piracy, said that he was informed that Teach had been lurking for some days in and about Philadelphia and that he suspected that many of the pirates who had surrendered under an offer of pardon still kept up a correspondence with their companions abroad. The Teach referred to was the notorious pirate "Blackbeard" who was shortly after killed in an encounter with a vessel fitted out by Virginia for his capture.³

It must not be supposed that either the provincial court or the council, in its judicial capacity, was a court of last resort. Under the charter the right was reserved to the king to hear and determine appeals from all judgments given in the province, and until the Revolution there was no court of last resort in Pennsylvania. A reference to this subject is contained in the commission of William and Mary to Governor Fletcher wherein it is provided that if either party to a civil cause is dissatisfied with the judgment of the superior court of the

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¹ *Memoirs Historical Society of Pennsylvania*, Vol. IV, part 2, 301.

² *Watson's Annals of Philadelphia* (1850), Vol. II, 218; III *Colonial Records*, 43, August 11, 1718.

³ Blackbeard's head was struck off and brought back in triumph on the end of the bowsprit. Afterwards his skull was made into the bottom of a very large punch bowl long used at the Raleigh Tavern at Williamsburg, Va.; *Watson's Annals of Philadelphia* (1850), Vol. II, 221.

province "they may then appeale unto us in Our privy Council, provided the matter in difference exceed the real value and Sum of three hundred pounds Sterling."¹ The Act of October 28, 1701,² contained provisions for appeals to England but no limit of money value was fixed. While the right to such appeals to England was, in this colony, unquestioned, the difficulty and expense of prosecuting them was such as to render them infrequent. In 1685 an appeal to England was allowed by the provincial court upon entry of security, but from the discussion in the council it would seem that the appellant failed to enter security as required.³

In December, 1699, Penn returned to America and began the work of reconstructing the government of the province, which had been restored to him on the express condition that he would put an end to the existing state of confusion.⁴ The political and constitutional history of provincial Pennsylvania has been ably and thoroughly treated elsewhere⁵ and it is not our purpose to refer to it except as it affected the courts. Suffice it to say that the period of utopian and paternal experiments had closed and that thereafter the proprietor and his successors were engaged in a struggle to maintain a difficult position between two fires; on the one side a democracy, selfish, narrow and individualistic, and on the other a home government, critical and contemptuous, that regarded the colony as little more than a nest of republicans and smugglers. Penn. found the assembly determined to strengthen its position and after much fruitless discussion, granted a charter

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¹ I Colonial Records, 313, 21, 9 mo. 1690.

² II Statutes at Large, 148, § 5.

³ I Colonial Records, 95, 11, 5 mo. 1685, and see page 98.

⁴ Board of Trade Journals, July 13, 1694; Mss. Historical Society of Pennsylvania, Vol. VII, 300.

⁵ Shepherd's Proprietary Government in Pennsylvania (Columbia University Studies in History, 1896).

conferring very extended powers on the legislative body and containing little else of constitutional importance.¹ Nothing was said of the judges. The provincial court was then an insignificant factor in the political life of the province and the organization of the courts was left to be regulated by an act of assembly, which will be referred to presently.

With the adoption of the charter of privileges of 1701, the government of the province assumed a form that it was to retain until the Revolution. The power of proposing and enacting laws passed to the assembly and the council ceased to exercise judicial powers. More important still, the council ceased to be an elected body and was thereafter appointed by the proprietor or in his absence by his lieutenant-governor. The effect of this was to throw into the assembly the abler spirits of the opposition and greatly strengthen that body, while the council, chosen from among the friends of the governor or proprietor, was thereafter regarded as representing the proprietary interests rather than those of the populace.

One humble court has not been referred to, that of the coroner. The following is a specimen of a verdict taken in 1699 in Chester County:—

“We whose names are underwritten, summoned and attested by the Coroner to view the body of Sarah Baker, haveing made strict enquiry, and alsoe had what evidence could be found, attested to what they know, and wee can find noe other but that it pleased Almighty God to visit her with death by the force of Thunder; and to this we all unanimously agree.”²

Who will say that this is not quite equal in intelligence to the verdict of the average coroner's jury at the present time?

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¹ II Colonial Records, 54, 28, 8 mo. 1701; Proceedings of the Constitutional Conventions of Pennsylvania of 1776 and 1790, 31.

² Chester County Records, 6, 5 mo. 1699, reprinted in Hazard's Pennsylvania Register, Vol. V, 156.

CHAPTER II.

In 1701 William Penn was called back to England to defend his proprietorship. Before his departure a general revision of the earlier legislation was undertaken at the sessions of the assembly held at New Castle in 1700 and at Philadelphia in 1701. The acts there passed, one hundred and fourteen in number, seem, in a sense, to have been regarded as supplying the previous legislation and were passed with the expectation of being presented to the privy council for approval, as required by the charter. In fact, when the board of trade inquired of Penn, on his return, as to whether the laws received from him were a complete body of all the laws of the province, he replied that he believed they were the present body of laws,¹ and it will be noticed that the compilations of the eighteenth century begin with the Acts of 1700.

Among these acts was one of October 28, 1701, entitled "An Act for Establishing Courts of Judicature in this Province and Counties Annexed."² Its origin was as follows: Edward Shippen, for the two previous years chief justice of the provincial court, and John Guest, the then chief justice, both members of the council, brought into the assembly on October 7th, a bill for establishing the courts, which was "unanimously rejected." Some few days after, David Lloyd, who was not then a member of either council or house, proposed a bill which was voted to be adopted with amendments, and Richard Hallowell and Isaac Norris were appointed a committee to draw up the bill, with the amendments. The bill met with no apparent opposi-

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¹ II Statutes at Large, 461.

² II Statutes at Large, 148; Charter and Laws of Pennsylvania, 311.

tion in the council. Without repeating its provisions in full, which would be tedious, it may be said by way of summary that the act provided for the holding of the "County Courts or Sessions" at stated periods, three justices to constitute a quorum, with jurisdiction in civil and criminal matters, capital cases excepted. These courts were required to observe as nearly as possible "respecting the infancy of this Government and capacities of the people, the methods and practice of the King's court of common pleas in England; having regard to the regular process and proceedings of the former county courts; always keeping to brevity, plainness and verity in all declarations and pleas, and avoiding all fictions and color in pleadings." Maritime affairs, not cognizable in the admiralty courts, were to be tried in a special manner before a jury of "merchants, masters of vessels or ship carpenters." The county courts also received equity powers, with the right of appeal to the provincial court from any decree or sentence made or given by the justices. The provincial court was to consist of five judges, appointed by the governor, three of whom were required to sit twice a year in Philadelphia, and two, at least, to go on circuit through the counties to try capital cases and serious crimes and hear appeals from the county courts. The governor, however, was to grant writs of error and writs of habeas corpus. The powers and duties of the orphans' courts were also defined and the forms of certain writs prescribed; all former laws relating to the courts were repealed.

There is little doubt that David Lloyd was the original draftsman of the bill and while the act, as finally adopted, contained in its main outline features afterwards recognized by the colonists as most convenient for Pennsylvania, it was, like other acts attributed to Lloyd, verbose, involved and overloaded with minor details of practice. Lloyd, no doubt, thought that he was faithfully adhering to the simplicity that had marked the

legal procedure in the province from the beginning, but he was a lawyer, and, like most of his brethren, could not divest himself of his professional circumlocution or exclude from his plan pet theories of his own. In the form adopted the act did not prove acceptable to the advisers of the Crown.

Penn himself seems, on second thought, to have found some objectionable features in the act and desired that it might not be confirmed but sent back to be amended. The lords commissioners for trade and plantations reported that the act, "so far from expediting the determination of lawsuits," would, as they conceived, "impede the same," and, accordingly, the act was formally disallowed and repealed on February 7, 1705, by the queen in council.¹ One of the objections that occurred to the minds of the English lawyers was to that clause which directed the courts to avoid all "fictions and color in pleadings." A doubt was entertained as to whether this might not preclude an action of ejectment. In this they were not far from the real purpose of the draftsman of the act, as would appear from a debate in the provincial council in December, 1704, upon a petition by Thomas Revel, the plaintiff in an ejectment, who complained that his case had been put off for nearly three years. John Moore, counsel for the plaintiff, and David Lloyd, for the defendant, being summoned before the council, Lloyd boldly argued that that method of trial being fictitious, was repugnant to the law of the province.² Lloyd, however, was clever

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¹ II Statutes at Large, 456, 482.

² II Colonial Records, 185, 19, 11 mo. 1704. Penn & Logan Correspondence, Memoirs of Historical Society of Pennsylvania, Vol. X, 5. Lloyd attempted to regulate the practice in ejectment in his bill of 1706 which was rejected by the governor. His idea was to require a real lease, entry and ouster and to do away with the fictitious proceeding—"A new practice, allowed only in Westminster Hall." II Colonial Records, 354, February 24, 1706-7.

enough at a later day, to use the action of ejectment with success in the Frankfort Company's case, which will be referred to hereafter.

The repeal of the Act of 1701 left the administration of justice in a confused state. There had been some debate in the session of the assembly of 1705 upon the subject of courts, but the repeal of the act was not known. Upon receipt of the order in council, Governor Evans called the assembly in special session, in September, 1706,¹ and presented to that body an act for establishing courts, drawn up, it was said, by some practitioners therein. The assembly, however, requested that the matter be referred to the new house, which met in October, 1706, and accordingly at the following session this was the first matter under discussion, the governor laying his bill before the house with his opening address. The assembly, or rather David Lloyd who dominated that body, had other views and presented them in what is described as a "long and tedious bill," which, on being read in council, was found to depart very widely from the plan proposed by the governor's advisers.²

We have not the text of these rival bills, which brought about a deadlock between the governor and the house, but it is apparent that both sides were struggling for the control of the courts and in view of the expected surrender of the government to the Crown, both were equally anxious to establish their position before that event.³

The plan endorsed by the governor included county courts with civil jurisdiction, exclusive in cases under

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¹ II Colonial Records, 261, September 19, 1706.

² II Colonial Records, 271, 14, 9 mo. 1706. In a speech the governor refers to it as "the longest perhaps that ever was drawn up in America." II Colonial Records, 313.

³ Penn & Logan Correspondence, *Memoirs of Historical Society of Pennsylvania*, Vol. X, 180.

ten pounds, and criminal jurisdiction, except in capital cases which were to be tried by special commissions of oyer and terminer; a provincial court for the whole province, to sit ordinarily at Philadelphia but to go on circuit twice a year, with original jurisdiction concurrent with the county courts in cases over ten pounds as well as on appeal from the county courts, and lastly, a court of equity to be held by the governor and council.¹ The assembly ever jealous of the centralization of authority objected to a separate court of chancery and to the exercise of original jurisdiction by the provincial court.² On the other hand, the governor pointed out that the bill proposed by the assembly contained precisely the same faults that had caused the rejection of the Act of 1701; that it went into matters of practice at great length which ought to be settled by rule of court; that the chancery practice ought to conform to that in the other English dominions; that there was too much leniency shown to debtors in the clauses relating to executions; that too much power was conferred on the court of the city of Philadelphia; that the provision for the payment of the judges was inadequate, and that the proprietors' rights were interfered with in the clause providing for the dismissal of the judges on the address of the assembly and for the appropriation of all fines and forfeitures to the support of the courts.³

The controversy began politely enough, for the governor and council were anxious to settle the administration of justice on a firm basis and to persuade the assembly to allow a fixed salary to Roger Mompesson, a good lawyer who had been persuaded to accept the office of chief justice. But as time passed and each

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¹ II Colonial Records, 268, 3, 8 mo. 1706.

² II Colonial Records, 263, 23, 7 mo. 1706; 266, 25, 7 mo. 1706; 276, 27, 9 mo. 1706.

³ II Colonial Records, 272, 16, 9 mo. 1706.

side adhered obstinately to its own view the tone of the respective messages became warmer. The governor hinted that if further delay occurred he would establish the courts by ordinance and charged the assembly with grasping for power.

"It might reasonably be thought a very easy business to establish the courts by a law, without raising new disputes and contending for such Grants of Power as are not essential to their Constitution, nor were ever in the People for these 24 years past, since this has been a colony."¹

To which the assembly rejoined that whoever advised the governor to establish courts by ordinance was an enemy to the welfare of the province; that they were not striving for power—

"but for what are essential to y^e Administration of Justice and agreeable to an English Constitution, and if we have not been in possession of this these 24 years, we know where to place the fault, and shall only say, tis high time we were in the enjoyment of our rights."²

It is needless to refer at greater length to the rhetorical flourishes of the combatants, which did not add particularly to clarity of reasoning. Conferences were held and bitter language used, the matter at one time taking the form of a personal controversy between the hot-headed young governor and the equally fiery speaker, when the latter declined to rise when addressing the governor at one of these debates.³

The assembly then proceeded to impeach James Logan, the secretary of the province, charging him with attempting to subvert the charter and set up arbitrary government. The governor, having twice adjourned

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¹ II Colonial Records, 298, 23, 10 mo. 1706.

² II Colonial Records, 304, January 15, 1706-7.

³ II Colonial Records, 326, February 6, 1706-7.

the courts pending the discussion and now despairing of reaching a conclusion, on February 22, 1707, issued an ordinance for the establishment of the courts, under a clause in the charter which authorized the proprietor to make wholesome ordinances for the preservation of the peace and the better government of the people.¹ The expedient was somewhat daring, as the charter further provided that such ordinances should not bind or charge any person for or in their "life, members, freehold, goods or chattels." In this ordinance the provincial court is first called the "Supream Court" of Pennsylvania.² The assembly prepared a bitter remonstrance against the ordinance and adjourned.³

Under this ordinance, which embodied the undisputed features of the proposed bills in a clear and concise form, the courts acted during the remainder of Evans's and the first two years of Gookin's administration, until, in 1710, when tired of quarreling over non-essentials, a court act was passed.⁴ By this act a court, called the "Supream Court of Pennsylvania," was established, consisting of four judges appointed by the governor, two to constitute a quorum, with power to hear appeals at law or in equity. The jurisdiction and practice of the quarter sessions and common pleas were elaborately defined and Governor Evans's ordinance was followed in the provision that all capital offenses should

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¹ II Statutes at Large, 500; Charter and Laws of Pennsylvania, 319; II Colonial Records, 349, February 21, 1706-7.

² In the list of acts before the Commissioners of Trade in 1694 is one purporting to be entitled, "Law about appeals to the Supream Court," but if this is the Act of 1693 it should have been Provincial Court. Board of Trade Journals, Mss. Historical Society of Pennsylvania, Vol. VII, 309.

³ II Colonial Records, 362, March 4, 1707.

⁴ February 28, 1710-11, II Statutes at Large, 301; II Colonial Records, 552, February 28, 1710-11.

be tried before commissioners of oyer and terminer specially appointed for the occasion.

This act was, with minor modifications, the same as that proposed by the assembly in 1706, for it appears in the minutes that on November 2, 1710, a bill for establishing courts prepared by a former assembly was read, which, being very long, was left to the further consideration of the house. Governor Gookin was of the opinion that the courts could be better regulated by ordinance and that three judges were sufficient for the supreme court, but ultimately gave in on most of the points formerly in dispute. The act is indeed long and complicated, embodying an almost complete code of practice in both civil and criminal cases and on appeal, with very definite limitations placed on arrests in civil actions. One proposal of the governor was adopted. It having been suggested by the justices that the common pleas should be separated from the sessions of the peace, "for that the Holding 'em together perplexes Bench Juries, parties & Witnesses,"¹ the act provided that the terms of the quarter sessions should begin on Mondays or Tuesdays and of the common pleas on the Wednesdays following. By a fee bill adopted the same day, the chief justice was allowed thirty shillings and the other justices twenty shillings for every day they sat in court.² Both of these acts were repealed by the queen in council on February 20, 1713, by advice of the solicitor general, Sir Robert Raymond, who was of the opinion that the practice provided would multiply trials at law in plain cases and make proceedings in law and equity insufferably dilatory and expensive.³

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¹ II Colonial Records, 549, February 10, 1710-11.

² II Statutes at Large, 331. Twenty shillings was the sum which Governor Evans considered "too small for any person duly qualified to accept of." II Colonial Records, 273, 16, 9 mo. 1706.

³ II Statutes at Large, 548; I Pennsylvania Archives (1st Series), 157.

It was no doubt very irritating to the anti-proprietary party that acts upon which they had expended time and thought should be continually repealed by the Crown upon pretexts that probably concealed the true motives for such action. The assembly had, however, hit upon a method of preserving its legislation, temporarily at least. Under the charter, all laws were required to be submitted to the council within five years of their enactment. The colonists took as much time as they pleased before submitting the acts, and, as a result, the laws generally remained in force nearly five years, and when the assembly was notified of their repeal, new acts on similar lines were passed. Against such tactics the commissioners of trade vainly protested.¹ During the intervals between the repeal of the old and the passage of the new court acts the governor maintained the courts either by special commissions to the judges or by general ordinances.

One act did succeed in obtaining favorable recommendation, that of March 27, 1712-13, relating to the organization of and powers of orphans' courts, a comprehensive statute which defined the duties of that court in relation to the estates of decedents, and the care of the estates of minors, and became the basis of all subsequent legislation extending and strengthening the jurisdiction of that admirable tribunal.

It would take up too much space to go over all the acts that fell before the criticisms of the council. One, that of May 15, 1715,² regulated the taking of appeals to Great Britain and required the appellant to give recognizance in double the amount of the judgment. The

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¹ II Statutes at Large, 554; III Statutes at Large, 441, 467. On the other hand, Penn complained of the expense to which he was put in endeavoring to have the acts approved by the crown officers.

² III Statutes at Large, 32, 440, 466.

objection to this act was that there was no sum limited for which an appeal might be brought, as provided in the instructions to the governors of all the plantations, but notice of this repeal does not seem to have reached Pennsylvania, and the act was printed as in force in all compilations of the laws down to the Revolution. The first definite reference to these appeals is, as we have seen, in the commission of William and Mary to Governor Fletcher, which limited appeals to cases involving more than three hundred pounds. Additional instructions were sent to the proprietors in 1726,¹ directing the suspension of execution pending the final determination of appeals, and in 1753 still more explicit instructions were issued to a number of colonies including Pennsylvania. By these instructions the governor and council were directed to hear appeals from the courts and if any of the judges who tried the case appealed were members of the council they were not to vote but to give the reasons for their decision. From the judgment of the provincial council an appeal was to be allowed to the king in council provided the matter in controversy involved five hundred pounds, and in cases of less than that amount where future rights might be bound or the king's revenue affected. The appellant was required to enter security for the judgment and costs and pending the appeal execution was to be suspended, unless security was entered for restitution.²

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¹ Charter and Laws of Pennsylvania, 395; I Pennsylvania Archives (1st Series), 196.

² II Pennsylvania Archives (1st Series), 107, see also, VIII New Jersey Archives (1st Series) 190. For appeals in other colonies, see *Winthrop v. Lechmere*, 1 Thayer's Cases on Constitutional Law, 34; VII Connecticut Colonial Records, 571 (1727); *Frost v. Leighton* (Mass. 1738), II American Historical Review, 229; *Perry v. Randolph*, Barradal's Reports, 2 Virginia Colonial Decisions, 22 (1726). In the introduction to Volume II of Acts of the Privy Council of England, Colonial Series (1910),

The directions for a judicial hearing before the provincial council must have been given in ignorance of the fact that under the Frame of Government of 1701 the council in Pennsylvania did not exercise judicial powers.

In 1718 two murderers, Hugh Pugh and Lazarus Thomas, attempted to gain a reprieve by an appeal to the king, but the council ignored their petition on account of the notoriety of their crimes.¹ The case of *Fothergill v. Stover*,² involving the admissibility in evidence of a letter from the secretary of the land office to a deputy surveyor, is said by the reporter to have been affirmed on appeal to the king, and the docket of the supreme court shows that such an appeal was taken.³ In fact there are several entries of this sort. In *Brown v. McMurtrie*, April Term, 1763, judgment is entered for the plaintiff on a special verdict, whereupon Mr. Galloway "prays leave to appeal to the King in Council," which is granted on giving security agreeable to the act of assembly and paying the costs. Below in another handwriting is the entry, "Judgment of the Supream Court confirmed by his Majesty in Council."⁴ There is a similar entry in *Nixon v. Long*, where Chew and Galloway appeared for the plaintiff and Dickinson and Ross for the defendant. Judgment for the plaintiff was entered on a demurrer to the evidence and on appeal to the king the judgment was "confirmed."⁵ There are two other entries of appeals in 1765,⁶ and at April

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will be found an interesting account of the practice of the council on appeal, while in the text are numerous examples of appeals from the West India Islands as well as from the colonies on the American Continent between 1680 and 1720.

¹ III Colonial Records, 30, May 8, 1718.

² 1 Dallas's Reports, 6 (1763).

³ April Term, 1763, Docket No. 3, page 450.

⁴ April Term, 1763, Docket No. 3, page 448.

⁵ April Term, 1765, Docket No. 4, page 93.

⁶ September Term, 1765, Docket No. 4, pages 120, 181.

Term, 1767, there are three suits by the same plaintiff against different defendants, in which appeals to the king were taken, security entered and transcripts of the record issued, but the result is not recorded.¹

It is interesting to note, that to the appeals from the various colonies and from the Channel Islands is to be traced the jurisdiction of the judicial committee of the privy council. The standing committee for trade and plantations was, by an order of 1691, directed to hear appeals and report thereon to the king in council.² Few cases came before the committee at first, but gradually their proceedings took a judicial form, the judgment of the members became a judicial decision, and the adoption of their report a *pro forma* matter. At this early period their decisions are but occasionally noticed in the English reports, but Lord Mansfield, in his speech on the Stamp Act, stated that he had in his early practice been much concerned in the plantation causes before the privy council and so had become acquainted with American affairs.³

The attempted appeal of Pugh and Thomas was based on the fact that seventeen of the grand jury which had indicted them and eight of the petit jury who found them guilty were Quakers who had qualified by affirmations instead of oaths. This calls attention to a difficulty that had long troubled the colony. The conscientious scruples of the Friends against judicial oaths had

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¹ *Swift v. Hawkins, Lightfoot and Jones*, Docket No. 4, page 591.

² Finlason's History of the Judicial Committee of the Privy Council, 39; V Pennsylvania Archives (2d Series), 436, 658. While there was a standing committee for hearing appeals, these petitions seem to have been frequently referred to special committees. The present judicial committee dates from the Act of 3 & 4 William IV, chapter 41.

³ Mansfield's speech on the Stamp Act, reprinted in Library of Original Sources, Vol. VII, 84.

been taken advantage of by their opponents, led by Colonel Quarry, to drive them from office and lessen their power.¹ An order had been procured from Queen Anne enjoining the administration of oaths to all persons willing to take them, an order which the Quaker justices were loath to enforce, while the justices of the church party declined to administer affirmations, lest they should mistake the sincerity of the affiant's religious scruples. Constant friction and mistrials resulted from this state of affairs, and more than one act was passed on the subject only to meet with technical objections in England.²

The popularity of Governor Keith enabled him to obtain the passage of the Act of May 31, 1718,³ which permitted affirmations by such as conscientiously scrupled to take an oath, but at the same time restored much of the rigorous criminal code of England, which the humanity of Penn had prevented from being put in force in the province. A few years later the Act of May 9, 1724,⁴ was passed which carefully prescribed the forms of declarations of fidelity, abjurations and affirmations to be taken by Quakers, with a proviso that the act was not to be construed as repealing the Act of 1718. To this the assembly in 1739 attempted to add a supplement for the relief of Scotch Presbyterians, who had conscientious scruples against kissing the Bible, permitting them to take the oath in the form commonly administered in Scotland. Approval of this act was refused on the advice of Sir Dudley Ryder and Sir John Strange, who criticised its loose wording and called attention to the danger of giving way to new

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¹ II Colonial Records, 38, 17, 3 mo. 1703.

² Shepherd's Proprietary Government in Pennsylvania, chapter VII, 351.

³ III Statutes at Large, 199; III Colonial Records, 63.

⁴ III Statutes at Large, 427.

scruples about oaths.¹ Subsequently the privy council relented and in 1772 an act was passed and approved which permitted witnesses to qualify either by a solemn affirmation, an oath in the usual form or an oath with uplifted hand.²

From the passage of the Act of 1718 capital punishment for the greater felonies was rigorously employed, until in 1794, principally through the efforts of Judge Bradford, the death penalty was abolished in all cases except high treason and willful murder. As a natural consequence the number of appeals for executive clemency steadily increased and the minutes of the council are full of such petitions.³ One of the most curious is the following:—

“A Petition of John Remington, Attorney at Law, delivered to the President, was by him laid before the Board and read, setting forth that the Petitioner was unfortunately deluded & drawn into the idle Diversion of performing the Ceremony of making a free Mason, in Order to which a Sport called Snap Dragon was prepared, at which the Petitioner was perswaded to be present; that unhappily some of the burning Spirit used in this Sport was thrown or spilt on the Breast of one Daniel Rees, which so burnt or scalded him that in a few days after the said Daniel dyed; That Doctor Evan Jones had been indicted as Principle for the Murder of the said Daniel Rees, & by a Jury of the County was found guilty of Manslaughter; That the Petitioner was also indicted as aiding & abetting the said Evan Jones, and altho’ no Evidence did or could appear to prove that the Petitioner had any hand in the throwing or spilling the said Liquor on the Body of the said Daniel, or was privy to any Design or Intention of doing harm to the said Daniel, or to any other Person, yet the same Jury had brought in a Verdict of Manslaughter likewise against the Petitioner, which if put in Execution would tend to the utter Ruin of the Petitioner, his Wife, and two small children, & therefore humbly praying that the President & Council would be pleased to grant him a Pardon; Whereupon the Board are of Opinion that the Petitioner

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¹ IV Statutes at Large, 337, 483.

² March 21, 1772, VIII Statutes at Large, 239.

³ See III Colonial Records, 35, June 15, 1718.

should be pardoned the Manslaughter aforesaid, and the burning in the hand, which by reason thereof, he ought to suffer; But it being observed that in the Course of the Tryal a certain wicked & irreligious Paper had been produced & read, which appeared to have been composed by the said Remington, who had made the aforesaid Daniel Rees repeat the same, as part of the form to be gone thro' on initiating him as a free Mason; the Board therefore agreed that the Pardon should be so restricted as that it might not be pleaded in Bar of any Prosecution that should hereafter be commenced against the said Remington on account of the said scandalous Paper."¹

It would seem that with the constantly increasing population, a disorderly element was introduced into the community that rendered stringent measures necessary for the protection of society. In 1726 a riotous crowd burnt down the pillory and stocks in the market place and the governor was obliged to issue a proclamation for the suppression of such tumults in the future.² In the newspapers will be found complaints against the authorities in England for making the colony a dumping ground for criminals and vagabonds.³ In 1717 the grand jury present:—

"Whereas, it has been *frequently and often* presented by several former grand juries for this city, the necessity of a ducking stool

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¹ IV Colonial Records, 276, Feb. 3, 1737-8. A full report of this affair will be found in the Pennsylvania Gazette, February 7, 1737-8. It appears that the parties concerned were not Free Masons, but practical jokers.

² III Colonial Records, 274, October 4, 1726.

³ As early as 1685 an ecclesiastical offender was offered an opportunity to emigrate to the new colony, as appears by the Privy Council minutes: "Whereas it has been this day represented to his majesty that Christopher Sibthorpe, brazier, is a prisoner in Woodstreet compter upon a capias on the Writ de excommunicato capiendo, his majesty was pleased to order the sheriffs of the city of London (taking good security that the said Christopher do forthwith transport himself and family to Pennsylvania in America and paying the charges of the court) sett him at liberty in order to his sayd voyage." Acts of the Privy Council of England, Colonial Series (1910), Vol., II, p. 79, § 176. The exile was an active Friend.

and house of correction, for the just punishment of scolding, drunken women, as well as divers other profligate and unruly persons in this place, who are become a public nuisance to the town in general; therefore, we the present grand jury, *earnestly* again present the same to this Court of Quarter Sessions, desiring their immediate care; that those public *conveniences* may not be longer delayed, but with all possible speed provided for the *detection* and quieting such disorderly persons." And a few years later, a second inquest, "taking in consideration the great disorders and the turbulent behaviour of *many* people in this city, present the great necessity of a ducking-stool for *such people*, according to their deserts."¹

There are many indictments for forestalling the markets and regrating, offenses against public trade that excited in that day the popular attention now centered on rebates and trusts.

Some presentments of the grand jury of Philadelphia will further illustrate the care of our ancestors for the manners and morals of the community.²

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¹ The Forum, Vol. I, 231. It is a matter of some doubt as to whether the ducking-stool ever was actually used in Philadelphia. In 1769 a woman was sentenced to be ducked at the end of Market street wharf, but we are not informed whether the sentence was carried into execution. In 1779 Ann Mease was sentenced to the same punishment but the council remitted the ducking January 26, 1780. XII Colonial Records, 235. In 1781 there was another conviction but the sentence was not carried out. In 1824 the supreme court held that the ducking stool was not the punishment for a common scold in Pennsylvania. *James v. Commonwealth*, 12 Sergeant & Rawle, 221 (1824). The Act of March 10, 1683, reënacted in 1693, provided that a scold should stand one hour in a public place with a gag in the mouth. Charter and Laws of Pennsylvania, 144, 198. This was supplied by the Act of November 27, 1700, II Statutes at Large, 85, which provided that the gagged person should stand in some public place at the discretion of the magistrate. The act was repealed in council because it was not stated how long the person should stand gagged and the penalty was too great. II Statutes at Large, 466.

² Quotations from Mss. Docket, given in Appendix to Vol. I of David Paul Brown's Forum, 573.

"Philadelphia, the 26th day of the 7th month, 1702.

"We, the Grand Inquest for this Corporation, do present George Robinson, butcher, for being a parson of evill fame as a common swarer, and a common drunker, & particularly upon the twenty-third day of this instant, for swaring three oths in the market-place, & also for utering two very bad curses the twenty-sixth day of this instant. Signed in behalf of self & fellows, by

"Jno. Pons, ferman."

"Submits, and puts himself
in mercy of the Court."

"George Robinson, fined xxx s.
for the oaths and curses."

"Philadelphia, ss.

"We, the Jurors for this city, doe present phillip Eilbeck, of Chester County, for that on the twenty-third Day of this Instant, at night, at the house of Margaret Garret, in the front street, in Philadelphia, aforsd, Did then & their mennace & threaten herman Debeck, by drawing his bagenet and making a pass at him, the said herman: & at the same time & place abovesaid, did utter three curses, to the terrifding of the said herman & other the Queen's Leige people, contrary to the laws in that case made & provided. Signed in behalf of the Rest of the Jurors, this 28th day of the 7th mo., 1702, pr.

"Jno. Psons, forman."

"Appears and submits, and puts
himself in mercy of the Court."

"Eilbeck for breach of the
peace and curses, xxx s."

"The 3d of the 12th mon: 1702.

"We of the Grand Jury for the City of Philadelphia, do psent John Satell for passing of bad counterfeit Coin to Anne Simes, on the 2nd of January Last past in her husbands house, now Living in Philadelphia, & Also finding the mettall in his pocket, which we think the Money was made withall.

"Signed in behalf of the Rest,
"Abra. Hooper, foreman."

"Philadelphia, ye 4th of the 12th mon., 1702.

"We, of ye Grand Jury for the Citty of philadelphia, Do pSENT John Joyse, for having of to wifes at once, which is boath against the law of God and man.

"Signed in behalf of the rest,

"Abra. Hooper, foreman."

"Philadelphia, ye 6th of the 3rd month, 1703.

"We, of the Grand Jury for this city, Doe present Alexander Paxton & his wife, for letting a house to John Lovet, he being a Stranger, & have not Given security for The In Demnifying of this Corporation.

"Signed in behalf of the rest,

"Abra. Hooper, foreman."

"Philadelphia, this third day of November, 1703.

"We doe also present Jon Furnis & Thomas McCarty & Thomas Anderson & henery Flower, barbers, for triming people on first days of the weeks, commonly called sunday, contrary to the law in that case made & provided.

"Signed in behalf of the rest of the Jurors,

"John Redman, foreman."

In 1731 an execution took place at New Castle which, it is to be hoped, was exceptional in the annals of the colonies. Catherine Bevan, together with a servant named Peter Murphy, were indicted, tried and found guilty of the murder of the woman's husband, Henry Bevan. The conviction would seem to have been obtained principally upon the confession of the servant. By the common law at that time the murder of a husband by his wife was petit treason, and the punishment was to be drawn and burnt. Accordingly, on September 10, 1731, the man was hanged and the woman burnt pursuant to their sentences.¹ A gruesome account of the

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¹ Such executions were not unusual in England. Sidney refers to a number, mentioned in the newspapers, including two in 1735, one in 1737, two in 1739 and one as late as 1789. Sidney's England in the Eighteenth Century, Vol. II, 299.

affair appears in Franklin's "Pennsylvania Gazette" for September 23, 1731:—

"She deny'd to the last that she acted any part in the murder and could scarce be brought to own that she was guilty of consenting. Neither of them said much at the place of execution. The man seemed penitent but the woman appear'd hardened. It was designed to strangle her dead before the fire could touch her; but its first breaking out was in a stream which pointed directly upon the rope that went round her neck, and burnt it off instantly so that she fell alive into the flames, and was seen to struggle."

To return to the courts. At a meeting of the council held on November 9, 1719, Governor Keith called attention to the repeal of the several acts relating to courts, and proposed that the board consider the best means of meeting the inconvenience caused thereby. The consensus of opinion was that the governor should issue special commissions authorizing the justices to hold court on the days when they should be held under the repealed laws. Similar action was taken in the following March in reference to the supreme court, and David Lloyd, who was now chief justice, prepared the forms of commission. In this way the courts were continued until at a meeting of the council, May 12, 1722, it was observed that the courts would be "more regularly and effectually established by ordinance, as they are done in some of our neighboring governments, than by any particular Commissions," and it was recommended that the matter be brought to the attention of the house of representatives. A bill was promptly passed and messaged to the council, where it was referred to Richard Hill, Isaac Norris, James Logan and the attorney general, Andrew Hamilton, for amendment. The bill as amended was returned to the house, and on May 22, 1722, became a law.¹

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¹ III Statutes at Large, 298.

This act apparently was never considered by the Crown, but, in some manner, was allowed to become a law by lapse of time, according to the charter. The reason for its escape lies probably in an oversight of the clerks of the council rather than in any intention on the part of the board to give it even a tacit approval. The act appears in a list, under consideration by the board of trade in 1739, which the lords commissioners could not find to have ever been approved.¹ Mr. Paris, the agent for the colony, after tedious searches, found some of these acts "laid up in a by corner of the Board of Trade and covered very thick with dust." In the list the act we are discussing is marked "supplied." As a matter of fact, three months before the time for its consideration had expired, the act had been supplied by the Act of August 27, 1727,² which was repealed by order in council September 21, 1731. In repealing the latter act, the point seems to have been overlooked that the Act of 1722 was revived by the repeal, and the question of the Crown's power to pass upon it then was not raised.

Upon the repeal of the Act of 1727 a special session of the assembly was called, and an act passed formally reviving the Act of 1722.³ This reviving act seems to have been allowed to become a law by lapse of time. Mr. Fane, the king's counsel, to whom it was referred by the lords commissioners, saw no objection to it. The Act of 1722, which in many of its provisions remained in force until after the Revolution, provided for county courts of quarter sessions, composed of justices appointed by the governor, three to constitute a quorum, and for similar county courts of common pleas, to be held after the quarter sessions by justices, also appointed by the governor, with authority to hold

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¹ III Statutes at Large, 488.

² IV Statutes at Large, 84.

³ November 27, 1731, IV Statutes at Large, 229.

pleas of assizes, *scire facias*, replevins and all manner of actions, civil, personal, real and mixed, and to grant writs of partition and writs of view.

As to the supreme court, the Act of 1722 provided as follows:—

“And be it further enacted by the authority aforesaid, That there shall be holden and kept at Philadelphia a court of record twice in every year: (That is to say) on the twenty-fourth day of September and the tenth day of April, if the same days, or either, do not happen to be the First day of the week, and in such case the said court shall be held on the next day following; which said court shall be called and styled the supreme court of Pennsylvania. And that there shall be three persons of known integrity and ability, commissioned by the governor, or his lieutenant for the time being, by several distinct patents or commissions, under the great seal of this province, to be judges of the said court, one of whom shall be distinguished in his commission by the name of chief-justice. And every of the said justices shall have full power and authority, by virtue of this act, when and as often as there may be occasion, to issue forth writs of habeas corpus, *certiorari* and writs of error, and all remedial and other writs and process returnable to the said court, and grantable by the said judges by virtue of their office, in pursuance of the powers and authorities hereby given them.

“Provided always, That upon (any) issue joined in the said supreme court, such issue shall be tried in the county from whence the cause was removed, before the judges aforesaid, or any two of them, who are hereby empowered and required, if occasion require, to go the circuit twice in every year, * * * * and to do generally all those things that shall be necessary for the trial of any issue, as fully as justices of *nisi prius* in England may or can do.

“And that the said judges, or any two of them, shall have full power to hold the said court, and therein to hear and determine all causes, matters and things, cognizable in the said court, and also to hear and determine all and all manner of pleas, complaints and causes, which shall be removed or brought there from the respective (general) quartersessions of the peace and courts of common pleas, to be held for the respective counties of Philadelphia, Chester and Bucks, as also for the city of Philadelphia, or from any other court of this province, by virtue of any of the

said writs. And to examine and correct all and all manner of errors of the justices and magistrates of this province, in their judgments, process and proceedings in the said courts, as well as in all pleas of the Crown, as in all pleas real, personal and mixed; and thereupon to reverse or affirm the said judgments, as the law doth or shall direct. And also to examine, correct and punish the contempts, omissions and neglects, favors, corruptions and defaults, of all or any of the justices of the peace, sheriffs, coroners, clerks and other officers within the said respective counties. And also shall award process for levying, as well of such fines, forfeitures and amercements, as shall be estreated into the said supreme court, as of the fines, forfeitures and amercements, which shall be lost, taxed and set there, and not paid to the uses they are or shall be appropriated.

“And generally shall minister justice to all persons, and exercise the jurisdictions and powers hereby granted concerning all and singular the premises according to law, as fully and amply, to all intents and purposes whatsoever, as the justices of the court of King’s Bench, common pleas and exchequer at Westminster, or any of them, may or can do.

“Saving to all and every person and persons, his, her or their heirs, executors and administrators, their right of appeal from the final sentence, judgment or decree of any court within this province, to His Majesty in council, or to such court or courts, judge or judges, as by our Sovereign Lord the King, his heirs or successors, shall be appointed in Britain, to receive, hear and judge of appeals from His Majesty’s plantations.

“Provided, The person appealing shall, upon entering his appeal in the court where the sentence, judgment or decree shall be given in this province, pay all the costs before that time expended in the prosecution, or defending the said suit; and shall further enter into bond, with two good and sufficient securities in the sum of three hundred pounds, to the defendant in the appeal, conditioned to prosecute the said appeal with effect within the space of eighteen months after the entry of such appeal, and to satisfy the judgment of the court from which he appeals; and further, to pay all such costs and damages as shall be adjudged to him to pay, in case a sentence, judgment or decree, pass against the said appellant, or in case he, she or they fail to prosecute their appeal with effect.

“And be it further enacted by the authority aforesaid, That the said judges of the supreme court shall have power and are hereby authorized and empowered, from time to time, to deliver

the gaols of all persons which now are or hereafter shall be committed for treasons, murders, and such other crimes as (by the laws of this province) now are or hereafter shall be made capital or felonies of death as aforesaid. And for that end from time to time to issue forth such necessary precepts and process, and force obedience thereto, as justices of assize, justices of oyer and terminer, and of gaol delivery, may or can do in the realm of Great Britain."

We have referred to the short-lived Act of August 27, 1727. This act was almost a counterpart of the Act of 1722, but was designed to deprive the supreme court of the power to institute original process. Its repeal was accomplished by John Moore, the king's collector of customs at Philadelphia, who strongly objected to it on the ground that actions involving the revenue would thenceforth have to be tried in the county courts. From the statements of Moore and Fitzwilliam, the surveyor general of the customs, it would appear that in 1724 there arrived at Philadelphia the ship *Fame* purporting to carry emigrants from the Palatine, but really containing a cargo of East India goods from Holland and articles of European manufacture which the navigation laws required to be imported from England only. Moore seized the ship but it was forcibly taken out of his possession by a mob, towed down the river and most of the cargo unloaded. Then, it is stated, Sir William Keith made a fresh seizure in a collusive action brought in the county court and the ship was sold for a trifling sum. Moore acting by advice of Sir Philip Yorke, the attorney-general, brought actions in the supreme court of Pennsylvania against the parties concerned, whereupon Keith and his colleagues in the assembly procured the passage of the Act of 1727 depriving that court of original jurisdiction. This, said Fitzwilliam, would discourage prosecutions for breaches of the acts of trade.

"For as the judges of those courts are men but of mean circumstances and as mean capacities, so are the juries more

apt to be biased in favor of those who transgress the law, the common people being generally of opinion that those who bring goods from foreign parts can afford them better penny-worths than others who import the like commodities from Great Britain where the duties and customs are high."

Moore added that the magistrates were "all merchants."¹ The proprietors addressed a counter petition to the council in favor of the act, stating that they were not concerned in the controversy between Keith and Moore but that the act had been passed after nine months careful consideration and was not intended to prejudice His Majesty's service, that so far as they were informed Moore was the first person to attempt to introduce the practice of bringing actions in the supreme court, and that it would prove a great hardship to the inhabitants living in remote settlements to compel them to attend court at Philadelphia and that the merchants were frequently gentlemen of the best fortune and substance as well as probity.² The act was referred to Mr. Fane, who wrote an elaborate opinion in which he questioned whether original jurisdiction was vested in the supreme court by the Act of 1722 although there were some words that pointed that way.

"It is true the judges of the Supreme Court in the case of Mr. Moore have thought fit to exercise a jurisdiction, but I see no great conclusion from thence, because courts of law are ever willing, upon the slightest pretenses, to extend their jurisdiction."³

The commissioners for trade and plantations reported adversely to the act and it was accordingly disallowed.⁴

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¹ IV Statutes at Large, 425, 430.

² IV Statutes at Large, 431.

³ IV Statutes at Large, 443.

⁴ IV Statutes at Large, 421, 449; III Colonial Records, 446, November 23, 1731. The assembly stated that the aspersions on the inferior courts were false and scandalous. Votes of Assembly, Vol. III, 168, 169.

Whatever may have been the intention of the Act of 1722, it would seem that the supreme court was chary of assuming original jurisdiction. Chief Justice Tilghman in *Commonwealth v. Smith*¹ informs us that prior to 1786 the court had, certainly for a long time, exercised no original jurisdiction except in cases of fines and common recoveries, which, though actions in form, were in substance no more than mere conveyances of record.

Two acts amending the Act of 1722 were passed prior to the Revolution. By the first of these, the Act of September 29, 1759, the judges of the court of common pleas were appointed to hold the orphans' court, a duty which had for some time previously been assigned to the quarter sessions, and the judges of the latter court were not to sit in the common pleas, which was to consist of five persons. No exception was taken to these provisions, which were approved, but the proprietors strongly objected to another clause in the act which provided that the judges of the common pleas, as well as the justices of the supreme court, should hold their commissions *quam diu se bene gesserint* and be removable only on the address of the assembly. The committee of the council were strongly against this provision, not only as limiting the charter rights of the proprietors, who were therein permitted to nominate judges without limitation, but as perpetuating in the seat of justice men of secondary capacity, except the chief justice. It was further stated that in the other colonies the judges held *durante bene placita*, and it was not expedient to make a change in Pennsylvania which would confer no real benefit upon the inhabitants and "excite a just jealousy in the other colonies by seeming to extend advantages to this proprietary government, which have been denied to those under

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¹ 4 Binney's Reports, 117 (1811).

his majesty's immediate care."¹ The act was accordingly disapproved September 2, 1760.

Another amendment to the Act of 1722 was adopted, by which the number of supreme judges was increased to four, and the removal of cases into the supreme court in suits involving less than fifty pounds, except in cases involving title to land, was prohibited under penalty, in the case of the plaintiff, of loss of costs and of the defendant of double costs. It was also provided that appeals to England should be taken only on demurrer to evidence, bill of exceptions or writ of error. This act was allowed to become a law.²

It will be noticed that no jurisdiction is conferred upon the courts in matters of divorce. We have seen that in the Dutch period divorce was recognized in accordance with the doctrines of the Reformation, but after the English conquest the subject is hardly recognized as belonging to the domain of ordinary courts. In an amendment to the Duke of York's Laws of 1665 it is provided that in cases of adultery the proceedings shall be "according to the laws of England which is by divorce,"³ but this does not say more than that a divorce *a mensa et thoro*, or judicial separation, would be recognized and Chancellor Kent is authority for the statement that during the colonial period no divorce took place in the colony of New York.⁴ In Pennsylvania the "great law" of 1682 in defining and punishing adultery provided that the guilty parties should "be liable to a Bill of Divorcement, if required by the grieved husband or wife" within a year after conviction.⁵ This was

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¹ V Statutes at Large, 462, 722.

² May 20, 1767, VII Statutes at Large, 107.

³ Charter and Laws of Pennsylvania, 63.

⁴ Kent's Commentaries, Vol. II, 97.

⁵ Charter and Laws of Pennsylvania, 109.

reënacted in 1693¹ and again in 1700² with a more severe punishment for the crime. The last act was repealed by the Crown in 1705 upon the advice of the attorney general, Sir Edward Northey, who pointed out that "by this law for adultery a bill of divorce is allowed to the injured husband and wife, but the divorce is not explained, whether to be a *vinculo matrimonii* or only from bed and board, as the ecclesiastical laws of England allow, which I think ought to be ascertained."³ The defect was remedied by the Act of January 12, 1705-6,⁴ which, in adultery, gave the injured party a divorce from bed and board, to be granted on bill by the governor or lieutenant-governor for the time being. This act was allowed to become a law. If the governor exercised this power it has escaped notice in the minutes of the council, but among the records of the court of chancery is a bill filed by a wife against her husband, praying for a writ of *ne exeat* against the defendant, until he should enter security to answer a bill for divorce.⁵ The writ was allowed but there is no entry of the final result of the divorce proceeding. It would have been strange, however, if the practice of obtaining a divorce by act of parliament, which was the only means by which the marriage bond could be dissolved in England in the eighteenth century,⁶ had not been imitated in America, and, accordingly, we

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¹ Charter and Laws of Pennsylvania, 194.

² Act of November 27, 1700, II Statutes at Large, 5.

³ II Statutes at Large, 490.

⁴ II Statutes at Large, 180. By another act, of the same date, a divorce from bed and board was allowed to the first husband or wife of a bigamist. II Statutes at Large, 181.

⁵ Rawle's Equity in Pennsylvania, Appendix, 25.

⁶ "As a matter of fact, for the century and a half during which the practice prevailed perhaps not more than two hundred such separations were granted." Howard, Matrimonial Institutions, Vol. II, 106.

find a bill passed February 18, 1769,¹ to dissolve the marriage between Curtis Grubb and Ann Few, his wife, and to enable him to marry again. Before approving this bill Governor John Penn sent to the assembly for the papers and proofs in support of the charges of adultery and bigamy made against the wife and suggested several amendments to the act.² When the laws of 1769 were submitted to the privy council, this act was referred by the committee for plantation affairs to Mr. Jackson, their counsel, who gave it as his opinion that the assembly had properly exercised a power which he was inclined to think they ought to be entrusted with, but, as the matter was very important, he advised that the attorney and solicitor-general be consulted.³ The point was so referred but no reply was received and the act became a law by lapse of time. The same question arose three years later when a bill was passed to divorce George Keehmle from his wife Elizabeth, who had been tried, in the supreme court, for adultery and convicted.⁴ This time the committee on plantations advised that the king should refuse to confirm the act and should give "such directions as shall have the effect to prevent the laws passed by the legislature of Pennsylvania, becoming a precedent and example for the exercise of like powers in other colonies." The act was accordingly declared void April 27, 1773,⁵ and in the same year a circular letter sent to the provincial governors commanding them not to give their assent to any bill "for the divorce of persons joined together in Holy

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¹ VII Statutes at Large, 263.

² IX Colonial Records, 564, 566, 567, 580.

³ VII Statutes at Large, 626.

⁴ VIII Statutes at Large, 243.

⁵ VIII Statutes at Large, 597, 600; Votes of Assembly of Pennsylvania, Vol. VI, 485, 488; X Colonial Records, 104.

Marriage."¹ Prior to this the governor had refused his consent to a bill "making void the pretended marriage of Rebecca Vanakin with a certain John Martin."² No more divorce acts were passed until 1779 when James Martin was divorced from his wife Elizabeth, who had eloped with Sergeant Havell of the British Army "taking with her the said James Martin's effects, and leaving him to pay sundry debts of her contracting."³ From this time the number of special acts granting divorces increases. Ten were granted prior to the Act of September 19, 1785,⁴ which conferred jurisdiction in divorce upon the supreme court and authorized absolute divorces in the cases of impotency at time of contract, bigamy, adultery and willful and malicious desertion for four years, as well as divorces from bed and board in other cases, an extremely liberal law for that day but soon superseded by legislation even more liberal. Private divorce acts, however, were passed by the legislature until forbidden by the constitution of 1874.⁵

An examination of the judges' commissions, in the archives, will show that the practice, prior to the Revolution, was to issue to the justices of the peace of each county a joint commission authorizing three or more of them to hold the quarter sessions, and likewise assigning any three or more of them to hold the court of common pleas. Separate commissions were issued

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¹ November 24, 1773, O'Callahan's Documents relative to the Colonial History of New York, Vol. VIII, 402; New Jersey Archives, Vol. X, 411, 412.

² *N. Colonial Records*, 40, 53, 54.

³ IX Statutes at Large, 433.

⁴ XII Statutes at Large, 94.

⁵ Eighteen private acts were passed in 1873. For the present law see the Act of March 13, 1815, 6 Smith's Laws of Pennsylvania, 286; Pepper & Lewis's Digest of Decisions, Vol. V, col. 7075; Stewart's Purdon's Digest, Vol. I, 1230.

to the chief justice and justices of the supreme court, and a joint commission of oyer and terminer.¹ In 1717 Governor Keith questioned the propriety of issuing commissions to the judges in the name of the proprietor instead of the king, since, even if the charter could be so construed, the king could not grant away any part of his prerogative inseparable from the sovereignty. The council replied that the difficulty arose from not distinguishing fully "between the state of England and that of new colonies made without the Verge of the ancient Laws of that kingdom."

"That these American Lands being new Discoveries of Tracts long settled by their native inhabitants the indians who were under no subjection to nor had any knowledge of the laws of England; those laws, whenever they come to reach these Lands, must by some Regular method be extended to them, for they cannot be supposed of their own nature to accompany the people into these Tracts in America, any more than they would the same persons going into any other foreign part of the world."

And further, that the royal prerogative as exercised in England could "no more be understood to accompany the sovereignty than all the other laws can."² Keith yielded to the opinion of the council. After the death of Penn, judicial commissions were issued in the name of the king and attested by the governor, by authority of the proprietor, while minor officials were commissioned in the name of the proprietors alone.³

In these commissions the time for which they are to run is not stated. The commission of the peace seems to have been filled up and renewed at first yearly, but later at longer intervals of irregular length, and it was

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¹ See examples in VIII Pennsylvania Archives (3d Series), 23.

² III Colonial Records, 23, February 14, 1717.

³ Charter and Laws of Pennsylvania, 382, 385; VIII and IX Pennsylvania Archives (3d Series), *passim*.

the custom for governors to renew the commissions at, or soon after, their accession to the government.¹ At these various renewals it may be presumed that undesirable members were dropped. The justices of the supreme court also were recommissioned from time to time, but would seem usually to have held their offices until death or resignation. The real trouble seems to have been to persuade men of ability to fill the thankless positions. The assembly neglected the matter of compensation, and on Penn's second visit he seems to have himself promised the chief justice one hundred pounds a year. In 1706 the salary of the chief justice is said to have been in arrears, and it was proposed that the assembly should be asked to make some provision for the judges, as it was unfair to throw this expense on the proprietor. Roger Mompesson, judge of vice admiralty, who was appointed to the office soon afterwards, accepted, "though the present encouragement be but very slender and no way inviting."² The perquisites of the court were the fees allowed by the fee bill. Those established by the Act of March 30, 1723,³ were four shillings for every *allocatur* signed, six shillings for every case brought into court by *certiorari*, taking bail two shillings, every judgment six shillings, every rule two shillings. As late as 1772 the salary of the chief justice of the supreme court was two hundred

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¹ So, also, on the accession of a new sovereign, III Colonial Records, 298, September 1, 1727. Chronological lists of the judges of the supreme court and of the court of common pleas and the orphans' court of Philadelphia County will be found in John H. Martin's *Bench & Bar of Philadelphia* (1883). Another list, slightly different, will be found in IX Pennsylvania Archives (2d Series), 629.

² II Colonial Records, 247, April 17, 1706.

³ III Statutes at Large, 369; same in Act of August 22, 1752; V Statutes at Large, 161.

pounds, and of the associate justices one hundred and fifty pounds.¹

In the county courts the justices received trifling fees for various services, and the expenses of the sitting of the court were paid by the county.

The Act of January 28, 1777,² provided that one justice should be appointed to preside in the respective courts of common pleas, quarter sessions and orphans' court, but the honorary office of president of the court had existed from the earliest times and was applied to the first in the commission, or senior justice, the same person being, in many cases, for a long series of years first in the commission.³ The city of Philadelphia, under its charter, had a criminal court of its own, presided over by the city recorder, usually a lawyer, assisted by the aldermen. Those of the aldermen who were in the commission of the peace also sat in the county courts.

By an Act of January 12, 1705,⁴ a special court was established for the trial of negroes, consisting of two judges, specially commissioned by the governor, in the respective counties, assisted by six freemen of the county; the purpose being to obtain speedy trials and summary punishment for negro offenders, whose crimes excited some alarm in the province. This act was repealed in 1780.

By an Act of May 28, 1715,⁵ the justices of the peace were given jurisdiction to try, and finally determine all suits for debts and demands under forty shillings,

¹ X Colonial Records, 53, September 19, 1772.

² IX Statutes at Large, 29.

³ Justice Moll is described as "president of the court at New Castle." Records of Court at New Castle, 496; see, also, I Colonial Records, 18, 23, 3 mo. 1683.

⁴ II Statutes at Large, 233.

⁵ III Statutes at Large, 63.

and issue executions on their judgments, through the constable, by levy on the goods or attachment of the body of the defendant. The court of the city of Philadelphia for the collection of small debts was abolished, and it was further enacted that no court of the province should have jurisdiction of debts under said amount, but that the act should be the exclusive remedy. Debts for rents or contracts relating to real estate were excluded from this jurisdiction. The act was allowed to become a law, and is the foundation of the present civil jurisdiction of the justices of the peace as amplified by the Act of March 20, 1810,¹ and subsequent acts.

Briefly summarized, the administration of justice at the beginning of the Revolution was vested in the county courts of quarter sessions, common pleas and orphans' courts, presided over by justices of the peace, commissioned by the governor, none of whom, prior to the Revolution, appears to have been learned in the law. There was a supreme provincial court consisting at first of five, later of three and finally of four judges, of whom the chief justice was generally a lawyer or at least possessed of some legal experience. This court had a general appellate jurisdiction, and original criminal jurisdiction in capital cases. The original jurisdiction in civil cases does not seem to have been well defined but was assumed to exist in cases of fines and common recoveries. Where a case appealed involved issues of fact, such issues were tried in the supreme court before a jury. The court sat twice a year in Philadelphia and went on circuit to the other counties when required. From this court an appeal could, in certain cases, be taken to the king in council. There were special courts, such as that of the corporation of Philadelphia and that for the trial of negroes, and, finally, the court of vice admiralty under the Crown.

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¹ P. L. 208.

As for the judges of the respective courts, to mention them all would be to give a biographical history of the province. Nearly every man of distinction at that day filled at some time a place on the bench. It was, in the lower magistracy, the stepping stone to higher office, and, with the higher officials, part of the burden and duty of government. It is interesting to note that Benjamin Franklin sat for a short time in the common pleas, but was wise enough to see that the position required a special knowledge that he did not possess and was not sufficiently interested to acquire.¹ Except the recorders of Philadelphia, few, if any, of the judges of the lower courts had any legal training, beyond such as they acquired in the exercise of their office. In the supreme court, David Lloyd, chief justice from 1717 to 1731, had a reputation in his day as an able lawyer, but in history he is chiefly conspicuous as the spokesman of the anti-proprietary party in the assembly, and, as we have seen, was actively concerned in the development of the judicial system of the province.² James Logan, his one-time enemy, who succeeded him in the office, was the most conspicuous figure in the province in his time, excepting only Penn himself. He was not a lawyer, but was talented and well educated, and had sat in the quarter sessions and common pleas of Philadelphia for years. John Kinsey, who became chief justice in 1743, was a lawyer in extensive practice, and the governor considered it a matter of congratulation that one of the legal profession had consented to take

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¹ Benjamin Franklin's Autobiography, chapter ix. A bill of exceptions signed by Franklin with the other judges of the common pleas is printed in Appendix B, Vol. I, of the Forum, by David Paul Brown.

² David Lloyd was born in 1656 in Montgomery County, North Wales, and was appointed attorney-general by Penn in 1686. At the time of his death in 1731 he resided at Chester. He left no descendants.

the position. At the time when Dallas's Reports begin, William Allen presided. He was said to be the richest citizen in the province and was a son-in-law of the distinguished lawyer, Andrew Hamilton. Educated in London, he had filled various offices, including those of mayor, recorder of Philadelphia and judge of the common pleas, and was also one of the original trustees of the College of Philadelphia.¹ In 1774 Benjamin Chew, who had studied law in Hamilton's office and also in the Middle Temple, was appointed chief justice. During the Revolution he was displaced, but after spending fourteen years in retirement was made president of the high court of errors and appeals in 1791.

In the early days of the settlement there was no public building in the capital where court could be held, and, as time went on, the inconvenience of this state of affairs became manifest. In 1705, the grand jury of Philadelphia County recommended the levy of a tax to build a courthouse "where the bell now stands."² This was at Second and Market streets where the town bell, erected on a mast, gave notice to the citizens of important gatherings. Penn had intended that the public offices should be placed in Centre square, but that spot was then far distant from the centre of population. There was some dispute between the city and county as to the division of the expense of erecting the proposed building and the matter was before the council in 1708, when Justices Growdon and Pidgeon stated that "it is not only scandalous to both town and county, but even to the whole Govmt. that while every other county has their County house, Here in the Capital town

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¹ It is said that Chief Justice Allen refused to issue Writs of Assistance to the customs officers at the time of the memorable agitation on that subject. Quincy's Reports (Mass.), 509.

² Watson's Annals of Philadelphia (1850), Vol. I, 350; Sharp & Westcott's History of Philadelphia, Vol. II, 857, Vol. III, page 1819.

of the Govmt. the Magistrates are obliged to hold court in an ale house."¹ It was finally agreed that if the county would build some necessary bridges, the town would build the courthouse. Accordingly a small, quaint two-story structure was built at Second and Market streets, of which the municipality was then very proud and which served all the purposes of a town hall. Here the assembly met until the erection of the statehouse and here elections were held, while from the balcony the inaugural addresses of the governors were delivered.² Near by were the stocks and the pillory. Besides the city and county courts, the supreme court also sat there twice a year. When the statehouse was finished the supreme court moved to that building. In 1787 the erection of a new courthouse was commenced at Sixth and Chestnut streets, upon land devoted to that use by the assembly in 1762,³ but while Philadelphia was the capital, the building was used by the Federal Government. When the capital was removed to Washington the courts took possession of the building long intended for their use. The old courthouse was ruthlessly torn down in 1837, an extraordinary act of vandalism even for those times.

In 1698 a volume was printed in London, entitled, "A historical and geographical account of the province of Pennsylvania and of the West New Jersey in America, etc., by Gabriel Thomas who resided there about fifteen years." Regarding two of the learned professions he writes: "Of lawyers and physicians I shall say nothing,

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¹ II Colonial Records, 425, April 5, 1708. The building was finished in 1710.

² The Pennsylvania Gazette of December 14, 1769, states that Governor John Penn's commission was read from the Court House in the presence of a concourse of people. An election riot took place on the staircase leading to the balcony in 1742.

³ Act of February 12, 1762; VI Statutes at Large, 177.

because the country is very peaceable and healthy; long may it continue so and never have occasion for the tongue of one and the pen of the other, both equally destructive to men's estates and lives; besides, forsooth, they hangman-like, have a license to murder and make mischief." Such views, so far, at least, as our profession is concerned, were not uncommon among the early colonists. Many of them belonged to persecuted religious sects whose experiences with the law in their former homes were not such as to inspire pleasant sentiments toward the courts or their officers. Few were drawn from that class of society which, through birth or education, could be expected to feel or display any interest in professional learning, while those few who might have done so, were enthusiasts, filled with utopian theories of government, or utilitarians, who regarded the lawyer as an "unproductive consumer." Nor was there anything to tempt an ambitious barrister to desert Westminster Hall for a hut in the wilderness. The colonists were usually poor, their possessions half-cleared farms, commerce was controlled by the mother country, fees were necessarily small, and the only road to professional distinction and wealth was through crown offices or successful land speculation. However, since courts without counsel are as Hamlet without Hamlet, there are evidences that even in the earliest days there were men willing to undertake the conduct of cases.

The early records of the court of assizes of New York show unmistakably the activity of certain men who appear in so many cases that they must have been regarded as regular practitioners.¹ In the records of

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¹ There are attorneys mentioned in the Records of the Court of New Amsterdam, Vol. 1, 190. Peter Alrichs, writing to Governor Stuyvesant March 30, 1658, says: "I have also to pay the attorney Schelluyn for salary earned by him in a suit against Dirck Cornelissen Heunich." VII Pennsylvania Archives (2d Series), 528.

the court of New Castle the following minute appears under date of November 7, 1676:—

“Uppon the Petition of Thomas Spry desiering that hee might bee admitted to plead some Peoples cases in Court etc. the Worpp^l Court have granted him License So long as the Petitioner Behaves himself well and carrys himself answerable thereunto.”¹

Evidently something must have happened in 1677 to disgust the governor with the ways of the law, for on May twenty-ninth of that year the governor and council “reso ved and ordered that pleading attorneys bee no Longer allowed to practice in ye Government but for ye depending Causes,” which order was read in open court at Upland and New Castle.² Prior to the receipt of this order at New Castle John Mathews petitioned to be admitted as an attorney. The record states:—

“The Court did admit the Peticon^r as an attorney and was sworne accordingly: You doe sware by the Everliving God that you will according to Lawe truely plead & manadge all cases wherein you shall bee Employed by Yo^r Clyant that you will not exact in yo^r fees above what shall bee allowed by the Governor & Court That you will not in one and the same action take fees both of the Pl^t and def^t That you will not take any apparent unjust case in hand, but in all Respects behave yo^rselve as all Attorneys are obliged to by the Lawes of this governmt”³

Subsequently it was ordered that—

“The Cryer of the Court is to have for every Attorney that shall be admitted & sworne in Court twelve Gilders or halfe a bever.”⁴

¹ Records of the Court of New Castle, 9. Spry was also a doctor. In the same year he got into trouble by assaulting Captain Collier with a cane while “overcome wth drinke” and was fined two hundred guilders by the court. Records of Court of New Castle, 103.

² Hazard's Annals of Pennsylvania, 438; Records of the Court of New Castle, 111; Records of Court at Upland, 82.

³ Records of the Court of New Castle, 83.

⁴ Records of the Court of New Castle, 101.

The crier no longer gets a beaver, but there is still a fee to be paid on admission by those prisoners of hope who have satisfied the examiners.

It was the dream of Penn that in his colony the laws should be so plain and the pleadings so simple that every person could plead his own cause, and it was so provided in his laws agreed upon in England and embodied in the Act of March 10, 1683. His paternalism, and the peace-loving tendencies of his more sincere followers, tended to discourage skilled advocacy. In 1685 and again in 1686 the council promulgated laws against lawyers' fees. That of 1686 is as follows:—

“For the a Voyding of to frequent Clamours and manifest Inconveniencies wch usually attend mercenary pleadings in Civill Causes, It is Enacted by ye authority aforesaid, that noe persons shall plead in any Civill Causes of another, in any Court whatsoever within this Province and Territories, before he be Solemnly attested in open Court, that he neither directly or Indirectly hath in any wise taken or received, or will take or receive to his use or benefit, any reward whatsoever for his soe pleading, under ye penalty of 5 lb. if the Contrary be made appear.”¹

Neither of these acts, however, passed the assembly.

It soon became evident that lawyers could not, or would not, be dispensed with, and in 1686 David Lloyd was dispatched by the proprietor to Pennsylvania with a commission to act as attorney-general of the province. The Acts of 1710 and 1715, for establishing the courts, had provisions for the admission of attorneys, as also the Act of May 22, 1722, which finally became a law, and which provided “that there may be a competent

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¹ Charter and Laws, 507; I Colonial Records 123, 2, 2 mo. 1686. This was not a new idea, as Massachusetts in 1641 and Virginia in 1645 had attempted by legislation to prevent attorneys from pleading for remuneration. Baldwin on Constitutional Law in Two Centuries' Growth of American Law, 14; see also, II Connecticut Colonial Records, 59.

number of persons of an honest disposition and learned in the law, admitted by the justices of the said respective courts, to practise as attorneys there." In the Act of March 30, 1722-23,¹ for regulating official fees, the attorney's oath is prescribed in a form very similar to that used at the present day: "Thou shalt behave thyself in the office of attorney, within the court to the best of thy learning and ability, and with all good fidelity, as well to the court as to the client. Thou shalt use no falsehood, nor delay any person's cause for lucre or malice."

Even before this a miniature bar had sprung up among those active in public affairs, among whom were Abraham Mann and John White, members of the assembly, and Patrick Robinson, clerk of the court, and afterwards a member of the provincial council. In 1683 John White was appointed attorney-general to try a case against counterfeiters, and in 1685 Samuel Hersent was appointed to this office. The two men who were most active during the earliest period were David Lloyd and John Moore. The latter, who had emigrated to Pennsylvania from South Carolina prior to 1696, was appointed advocate of the court of admiralty by Colonel Quarry, and was afterwards attorney-general. As the province grew and prospered others came in, and in the early part of the eighteenth century there was a considerable influx of educated lawyers. The natural result was greater precision in the pleadings and closer adherence to English forms and practice. Robert Assheton, who filled the office of prothonotary from 1701 to 1727, as well as that of associate justice of the supreme court, was a trained lawyer; from his time the indictments were scientifically prepared, and in fact all the clerical work of the court offices improved. Nevertheless, the bar

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¹ III Statutes at Large, 379.

must have been a small and select body, since there are recorded accusations of attempts to monopolize it. In 1708¹ a petition was read in the council from one James Heaton—

"representing that he had been sued in an Action of Trover and Conversion, in the County of Bucks, by J. Growdon, yt he had procured a writt of Error, by which the cause is to be brought before the Provincial Judges, in the said County, the 14th of this Instant; that in the meantime the said Jos. Growdon arrested him in Philadia. on the same account in an Action to which he must answer at the County Court in Philadia., on the 15th Instant, wch. two several Courts coming so near together layes the Petitr. under great hardships; he also represents that his antagonist himself is Judge of the Provincial Court, and further that he has retained all the Lawyers in the County (that have leave to plead,) against him; Whereupon he prays that the Govr. would be pleased to appoint an Impartial Judge to hear his cause, and would either assign him Counsel, or so ascertain the Provincial Court, that if he be at the Charge of procuring some from New York, he may not be disappointed.

"Upon wch. Jos. Growdon himself being present, answer'd that his action in Bucks, and that in this County, are different; that he never retained more than one Counsell, viz: John Moore, in this cause, but that he not being able to attend, procured another to act for him; by which means without any design of his, two became Concerned in it, that it being impracticable that a man should Judge in his own cause: that part of the Petition was altogether needless."

It was resolved that the petitioner be left to find his own counsel, and Yeates, the second judge, was assigned to hear the case.

In the following year Francis Daniel Pastorius and Johannes Jawert petitioned the council against proceedings in ejectment brought by one Sprogel to recover the estates of the Frankfort Company, an association of German purchasers of land, averring that Sprogel as part of his "abominable plot did fee all the known

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¹ II Colonial Records, 423, April 2, 1708.

attorneys or lawyers of this province either to speak for him or to be silent in court, in order to deprive the petitioners of all advice in law."¹ Upon examining the petitioners in the council David Lloyd was declared "the principal agent and contriver of the whole," and steps were taken to protect the purchasers. The case is reported in Pennypacker's Colonial Cases with an account by Pastorius of the whole curious transaction.²

In *Lyle v. Richards*³ Chief Justice Tilghman remarks that there were few lawyers of eminence in the province prior to Tench Francis, although there were never wanting strong minds well able to conduct the business of the courts, and the fact that the leading lawyers of the following generation received their training in the Inns of Court led them perhaps to look down on their predecessors, some of whom were in extensive practice that included the neighboring colonies. Disparaging remarks by contemporaries are not infrequent. Secretary Richard Peters, writing in 1749 to the proprietors says of the bar in general: "All of whom except Francis and Moland are persons of no knowledge, and, I had almost said, of no principle."⁴ One name, however, stands at the head of the early bar, that of the brilliant Andrew Hamilton. The history of Hamilton is worth

¹ II Colonial Records, 447, March 1, 1708-9.

² *Heather v. Frankfort Co.*, Pennypacker's Colonial Cases, 142; II Colonial Records, 447, March 1, 1708-9. That the "cornering" of the bar was not a new experiment would appear from an incident mentioned by Barrington in his "Observations on the Statutes," page 294n. "There is also — — — a petition of Robert Pickerell, exhibited to the king in parliament the second year of Richard the Second; by which he complains that Alice Perrers had retained all the advocates in Westminster Hall, so that he could have no advice; 'si il ne donneroit si grande somme d'or, quil ne poit attainder.'"

³ 9 Sergeant & Rawle's Reports, 322 (1823).

⁴ Watson's Annals of Philadelphia (1850), Vol. I, 316.

noting, as he is the only American lawyer of his generation that enjoyed an international reputation. A native of Scotland, he first taught school and then practiced law in Maryland, from whence he removed to Philadelphia, about 1715, having been retained to represent the proprietary interests. In 1717 he became attorney-general and was active in the litigation over the Maryland boundary. He also appeared in the high court of chancery for the young proprietors, in the contest over Penn's will,¹ having been called to the English bar in 1712. The most interesting personal episode in his career was the part he took in the erection of Independence Hall, which was built from plans prepared by him and under his personal supervision. To the legal profession he is best known for his brilliant and successful defense of the printer, Peter Zenger, tried for seditious libel, a case of real historical importance as well as contemporary interest. In this case, tried in the supreme court of New York in 1735, Hamilton, after the court had refused his offer to prove the truth of the statements alleged to be libelous, carried the jury against the instructions of the court and obtained the defendant's acquittal by a bold address in which the liberty of the press was asserted with unprecedented vigor. The doctrines which he advanced, regarded as unsound at the time, have since become indelibly impressed upon English and American law, and the trial deserves careful reading on account of the light that it throws on contemporary political conditions and the effect that it had on the law of libel.² On the other hand, the

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¹ VII Pennsylvania Archives (2d Series), 94. See sketch of his life in Vol. I, Lewis's *Great American Lawyers* (1907), 1.

² Howell's *State Trials*, Vol. 17, 575. In Pennsylvania the quarter sessions of Philadelphia had in 1692 allowed the question of the seditious character of a publication to go to the jury. *Proprietor v. Bradford*, Pennypacker's *Colonial Cases*, 117.

part played by Hamilton in the suppression of the court of chancery shows a willingness to sacrifice the science of jurisprudence to the exigencies of politics, characteristic of his time, but not in keeping with the best professional traditions. Tench Francis, the next bar leader of distinction, enjoyed a greater reputation with his successors in the post-Revolutionary period, and is praised by those whose learning entitled them to speak with authority.¹

As the century advanced it became the general custom, for those who could afford it, to send their sons to be educated in the law at the Inns of Court. This was more prevalent in the Southern and Middle than in the New England colonies. From 1760 to the end of the Revolution there were more than one hundred American students of law in London, of whom forty-seven were from South Carolina, twenty-one from Virginia, sixteen from Maryland, eleven from Pennsylvania, five from New York and the rest from the other colonies, no other colony than those named having more than two students.² Many of these men attained great distinction in professional and public life. Among those from Pennsylvania were Chief Justices Benjamin Chew, Thomas McKean, Edward Shippen and William Tilghman; Justice Jasper Yeates; Presidents of the Supreme Executive Council, Joseph Reed and John Dickinson; as well as such distinguished lawyers and citizens as Nicholas Waln, Edward and Richard Tilghman, William Rawle, Jared Ingersoll and Peter Markoe. It is not to be supposed that the education afforded by the Inns of Court corresponded to that given in a modern law school. Everything depended on the diligence of the

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¹ It is a curious fact that a number of the bar leaders came from Maryland to Pennsylvania—Andrew Hamilton, Tench Francis, Benjamin Chew and the Tilghmans.

² *Life and Times of John Dickinson*, 28.

student himself, and admission as a barrister came in due course after eating the required number of dinners regularly during the appointed terms. But the atmosphere and associations were conducive to study, while inspiration was to be drawn from the courts at Westminster, where the student attended and took notes of the arguments and decisions. Such notebooks were, in those days of scanty reporting, the treasured possessions of lawyer and judge and carefully consulted in the preparation of important arguments and decisions. In *Clayton v. Clayton*,¹ the manuscript notes of one of these students were cited in the supreme court of Pennsylvania. The case was one involving the question as to whether certain devisees under a will took an estate in fee or for life, there being no words of inheritance, but a direction to divide. Mansfield's decision in *Wigfall v. Brydon*,² was cited in favor of a fee. It being difficult to reconcile this decision with other authorities, the case was explained as turning on a direction to sell and divide, which appeared from the manuscript notes of the case of *Goodright v. Patch*, decided in the King's Bench, June 20, 1773, taken by Edward Tilghman while a student at law. So, too, in the political capital of the kingdom, the student studied the conflicting doctrines of the Tory and the Whig and prepared his mind for the momentous changes about to occur in his home across the sea.

Those who could not go abroad for a legal education served a clerkship in the office of a practitioner in the courts. Just what were the qualifications for admission do not seem to be recorded. At the earliest period sufficient assurance seems to have been all that was required, but, as the legal fraternity became better

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¹ 3 Binney's Reports, 476 (1811).

² 3 Burrough's Reports, 1895 (1766).

organized, it may be presumed that the courts gave more consideration to the fitness of applicants. In 1759 the supreme court made an order—

“That for the future no persons be admitted attorneys or council of this court without being previously examined as to their qualifications to practice, nor without having taken the oaths or affirmations of allegiance to his Majesty and subscribed the usual Declaration.”¹

At September term, 1760, Mr. Chew and Mr. Ross were appointed to examine an applicant and at April term, 1761, Francis Hopkinson was examined by Mr. Ross and Mr. Dickinson. Later admissions do not recite an examination, and, perhaps, this duty was delegated to the local bar, but the fact that there are no common pleas dockets for Philadelphia County on file prior to the Revolution renders the subject obscure. From the few minute books of the Philadelphia common pleas that have escaped destruction we find that by 1790 it was the established practice for a member of the bar to move in open court for the admission of the candidate. The court would then appoint a special committee of three members of the bar to conduct the examination, and, if the result was favorable to the applicant, he was admitted and sworn.²

Prior to the Revolution the path of the law student was made easier by the publication of Blackstone's Commentaries, a work that was said by Edmund Burke to have had a larger sale in America than in England, a statement that would seem to be justified, for hardly had the first complete edition appeared in England before an American edition was printed at Philadelphia (1771) of which about fourteen hundred copies were

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¹ April Term, 1759, Supreme Court Docket No. 3, page 83.

² Minute Book, Court of Common Pleas, Philadelphia County, March Term, 1790.

subscribed for in advance, and this although one thousand copies of the English edition had been imported and sold in America.¹ The subscription list to the local edition is headed by seven colonial governors and lieutenant-governors, including Richard Penn of Pennsylvania and William Franklin of New Jersey. The alphabetical list, headed by "John Adams, Esq., Barrister at Law, Boston," includes many distinguished names, while of the local subscribers, many were from the interior parts of the state; John Creigh, bookseller of Carlisle, alone subscribing for forty-five sets. It is hardly possible to overestimate Blackstone's influence upon American private law. His Commentaries became at once the *vade mecum* of the lay judge and the pioneer lawyer, in regions where libraries were unknown. The work in fact long stood for the common law itself in many communities, but it may be questioned whether the Commentaries were not, for a period, detrimental to legal scholarship, whether their flowing sentences did not carry the superficial student too easily over the submerged rocks of the common law, whether learned jurists have not wasted time in the discussion and criticism of Blackstone's theories and errors that might have been better spent in a re examination of his sources.

As the Revolution approaches we find an able group leading the bar, Moland, Chew, Ross, Waln, Tilghman, Galloway and Dickinson. Time was no object to the courts in those peaceful and slumberous days. In a manuscript book of reports giving some cases of that time the reporter says, in noting *Haldane v. Duffield*, April Term, 1768, "The remainder of Mr. Chew's argument I did not hear nor did I wait Mr. Dickinson's and Mr. Tilghman's conclusion, this case having continued

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¹ Hammond's Blackstone's Commentaries, Preface, page viii.

twelve hours."¹ In 1774 Chew succeeded Allen as chief justice,² and in September of that year hospitably entertained the members of the Continental Congress then assembled in Philadelphia. Washington and John Adams both mention dining with him on the twenty-second of that month. Adams writes in his diary:—

"Dined with Mr. Chew Chief Justice of the Province with all the gentlemen from Virginia, Dr. Shippen, Mr. Tilghman and many others. We were shown into a grand entry and staircase and into an elegant and magnificent chamber until dinner. About 4 o'clock we were called down to dinner. The furniture was all rich. Turtle and every other thing, flummery, jellies, sweetmeats, of 20 sorts, trifles, whipped sillabubs, floating islands, fools, &ct., and then a dessert of fruits, raisins, almonds, pears, peaches. Wines most excellent and admirable. I drank Madeira at a great rate, & found no inconvenience in it."³

The stately mansion of the chief justice yet stands, the fine old colonial hospitality a treasured memory. The smoke and dust of fratricidal war darkened it, its walls were battered with shot and its floor stained with blood; bench and bar were scattered, some to attain distinction in the camps and councils of the new nation, others to live obscurely through weary years of suspicion or to fly from the country of their birth as attainted traitors, their lands forfeited and their names soon forgotten.

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¹ Keith's Provincial Councillors, 328.

² X Pennsylvania Colonial Records, 173, April 29, 1774.

³ Keith's Provincial Councillors, 329.

CHAPTER III.

The appearance docket of the supreme court for April Term, 1776, contains the following entry:—

“Philadelphia, s. s.

“At a Supream Court held at Philadelphia for the Province of Pennsylvania the tenth day of April in the sixteenth year of the reign of our Sovereign Lord George the third King of Great Britain France and Ireland, Defender of the Faith &c and in the year of our Lord one thousand seven hundred and seventy six: and continued by adjournment until—”

Until when? Doomsday no doubt; for this was the last court held under our “Sovereign Lord George” and the date of continuance was never filled in. Independence, however, was not welcomed in Pennsylvania with the same enthusiasm as in the New England states. At the beginning of the conflict the influential and conservative element in the province while opposed to the measures of parliament was exceedingly adverse to the idea of a separation from Great Britain. The grievances of the Pennsylvanians were not as great as those of the other colonists; they had a liberal charter and a satisfactory system of local government, while the proprietary family stood between them and the Crown to soften controversies and prevent conflicts of authority; many earnestly hoped for reconciliation and were carried on the tide of revolution sorely against their wills. To accelerate the movement and to get rid of the conservatives, a bold, radical minority, with the moral support of congress, organized and carried through a revolution in the government of Pennsylvania. A convention called in July, 1776, and presided over by Franklin, drew up a new constitution, which, after considerable opposition, was declared to have been

adopted. Penn's charter was discarded, the proprietary government ceased to exist, the old officials and assembly retired and new men took their places.

The Constitution of 1776 was not a satisfactory instrument and was discarded after a fourteen years' trial, but some of its features are worth noticing. The executive power was vested in a supreme executive council composed of twelve members, one from the city of Philadelphia and eleven from the respective counties. The term of office was three years, and the president and vice-president were chosen from the council by joint ballot of the assembly and council. The president and council were empowered to choose and commission all judges and other officers and fill vacancies in office. Every officer of the state was subject to impeachment by the assembly, the impeachments to be heard before the president and council. The principal judiciary clauses were as follows:—

“Sec. 23. The judges of the supreme court of judicature shall have fixed salaries, be commissioned for seven years only, though capable of reappointment at the end of that term, but removable for misbehaviour at any time by the general assembly; they shall not be allowed to sit as members in the continental congress, executive council or general assembly, nor to hold any other office, civil or military, nor take or receive fees or perquisites of any kind.

“Sec. 25. Trials shall be by jury as heretofore, and it is recommended to the legislature of this state to provide by law against every corruption or partiality in the choice, return or appointment of juries.

“Sec. 26. Courts of sessions, common pleas and orphans' courts shall be held quarterly in each city and county, and the legislature shall have power to establish all such other courts as they may judge for the good of the inhabitants of the state; all courts shall be open, and justice shall be impartially administered without corruption or unnecessary delay: All their officers shall be paid an adequate but moderate compensation for their services, and if any officer shall take greater or other fees than the laws allow him, either directly or indirectly, it shall ever after disqualify him from holding any office in this state.

"Sec. 27. All prosecutions shall commence in the name and by the authority of the freemen of the commonwealth of Pennsylvania, and all indictments shall conclude with these words—*against the peace and dignity of the same*. The stile of all process hereafter in this state shall be *The commonwealth of Pennsylvania*."¹

The office of justice of the peace was made elective, the voters of the respective districts to choose two, one of whom was to be commissioned by the president for the term of seven years.

A peculiar feature of the constitution was the provision for the election every seven years of a council of censors who were to meet and inquire whether the constitution had been preserved inviolate, whether the laws were duly executed, and, if there appeared any necessity to amend the constitution, to call a convention for that purpose. While these changes were in progress and while most of the active citizens were engaged in war or political strife, the administration of justice was sadly neglected.

By an act of January 28, 1777,² passed for the purpose of putting into effect such and so much of the laws of the province as were necessary in the commonwealth, it was provided, that the courts of quarter sessions and gaol delivery, petty sessions, common pleas, orphans' courts, supreme court, courts of oyer and terminer and general gaol delivery should be held and kept in each respective county at the times and places appointed by law, with all the powers, authority and jurisdiction which by law such justices and judges theretofore had had and exercised and such as were given by the constitution. It was further provided that the president and council should appoint one justice in each county

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¹ Proceedings of the Constitutional Conventions of Pennsylvania of 1776 and 1790, 61. The equity clause will be referred to later.

² IX Statutes at Large, 29.

to preside in the respective courts and in his absence the justices who should attend were to choose a president. All actions in the provincial courts were continued in the same state as if the authority of such courts had never ceased.

The chief justice of the new supreme court was Thomas McKean, a signer of the Declaration of Independence and one of the most active of the patriot party. The associate justices were William A. Atlee and John Evans. The suspension of the courts caused considerable inconvenience and letters and petitions complaining of the prevailing conditions were presented to the council.¹ In the counties the same trouble was had with regard to the justices, many of whom were away, or unwilling to act in the unsettled state of affairs; in some parts of the state the local committees of safety assumed judicial power and took cognizance of minor crimes.

The first session of the common pleas, at Philadelphia, when the style of process was altered from king to commonwealth, was held in September, 1777, when six attorneys were admitted to practice,² but the British were already marching on Philadelphia, and before the end of the month the army of King George had expelled the new government.

During the occupation of Philadelphia by General Howe, from September, 1777, to June, 1778, the seat of government was in Lancaster. With the return of the state officials to Philadelphia the various agencies of proscription became active. Many persons were declared traitors and their estates forfeited to the

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¹ VI Pennsylvania Archives (1st Series), 228, 245, 294; VII Pennsylvania Archives (1st Series), 72; IX Colonial Records, 214, 260.

² Biography of William Lewis, Pennsylvania Magazine, Vol. XX, 30.

commonwealth.¹ The most important cases tried before the newly organized supreme court were treason trials, among which those of Roberts and Carlisle, which are very briefly reported, aroused great popular interest.² Roberts, a miller of Lower Merion Township, was accused of acting as a guide to Sir William Howe and of persuading various persons to enlist in the British army. Carlisle was charged with having accepted a commission to keep watch over the gate of the city of Philadelphia, established by Howe to prevent the ingress and egress of persons not provided with passes. The accused were tried on the twenty-fifth and thirtieth of September, 1778, found guilty and sentenced to be hanged. Earnest appeals for executive clemency were made on behalf of the prisoners by petitions, but the council was firm and both men were hanged. In these, as in most of the other treason trials, James Wilson appeared for the defendants and acquired such unpopularity through his faithful efforts in behalf of his clients that his house was attacked by a mob, which was driven off only after a fight that cost several persons their lives.

The Revolution brought to an end the court of vice admiralty, of which Edward Shippen was judge, and it became necessary to create a tribunal to take its place. The Continental Congress advised the several legislatures to establish courts of admiralty and, accordingly, the assembly, on March 26, 1776, passed a resolution creating a court of admiralty to be held in the city of Philadelphia to try cases of captured vessels brought into that port, with the right of appeal to congress or to such person or persons as they should appoint to hear appeals.³

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¹ X Colonial Records, 610, 745.

² *Respublica v. Carlisle*, 1 Dallas's Reports, 35 (1778); *Respublica v. Roberts*, 1 Dallas's Reports, 39 (1778); and see IX Colonial Records, 600, 613.

³ Journal of Congress, Vol. 1, 260; VIII Statutes at Large, 519.

For this last purpose a committee was appointed by congress, whose feeble and unsupported authority was openly defied by George Ross, the Pennsylvania judge of admiralty, in the case of the "Active," giving rise to a memorable controversy carried on in the courts long after the adoption of the constitution of the United States, and nearly resulting in an armed conflict between the federal and state authorities. This case, or rather series of cases, pointedly illustrates the growth of the federal power, the decree of the helpless commissioners of admiralty of the Continental Congress, long flouted by the state judges, prevailing, after many years, by virtue of a judgment of the supreme court of the United States, to whose authority the state officials, after calling out the militia to resist the marshal, yielded a sullen obedience.¹

Francis Hopkinson, the distinguished writer, who succeeded Ross in 1779, was the first state judge to undergo the unpleasant experience of an impeachment by the assembly. This proceeding, which took place in December, 1780, was the result of a complaint by the judge against Mathew Clarkson, the marshal of the court, which resulted in his dismissal. Clarkson in revenge made charges against the judge before the assembly, which voted for his impeachment. The court consisted of President Reed and the council. Smith and Galbraith managed for the house with Attorney-General Bradford, while Judge Hopkinson was represented by James Wilson. The principal charges against the judge were that he had wrongfully issued a writ for the sale of the cargo of a ship, and that he had exacted illegal

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¹ *Ross v. Rittenhouse*, 2 Dallas's Reports, 160 (1792); *Olmstead's Case*, Brightly's Nisi Prius Reports, 9 (1809); *United States v. Peters*, 5 Cranch (U. S.) 115 (1809); *Trial of General Bright*; *Federal Courts before the Constitution*, 131 *United States Reports*, appendix at page xxix.

fees in a prize case. The judgment of the council, as pronounced by the president, was an acquittal upon all the charges, although it seemed to the council that the fees, which were charged according to the recognized practice of the court, were excessive.¹ Upon the adoption of the constitution of the United States admiralty jurisdiction passed to the federal district courts and Judge Hopkinson was appointed the first district judge for Pennsylvania under the Act of Congress of September 14, 1789.

The necessity for a court of last resort to take the place of the privy council of Great Britain was met by the creation of the High Court of Errors and Appeals, under the act of February 28, 1780,² to hear appeals from the supreme court, the register's courts and the court of admiralty.

This act, after reciting that the laws of the late province gave a very precarious, difficult and expensive remedy to parties injured by erroneous judgments, by appeal to the king in council, and that as "the good people of this commonwealth, by their happy deliverance from their late dependent condition, and by becoming free and sovereign are released from this badge of slavery and have acquired the transcendent benefit of having justice administered to them at home and at moderate costs and charges," enacted that a court of error should be established composed of the president of the supreme executive council, the judges of the supreme court, the judge of the admiralty, together with three persons of known integrity and ability commissioned for seven years, any four or more of them to constitute a quorum. The court in this form had but a brief existence, its composition being materially changed

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¹ Pennsylvania State Trial (Hogan, 1794), 3; XII Colonial Records, 584, December 26, 1780.

² X Statutes at Large, 52.

by the Act of April 13, 1791.¹ Of the presidents of the council, Reed and Dickinson were leading lawyers and Dickinson rendered at least one very able decision in the admiralty case of *Talbot v. Three Brigs*.² Benjamin Franklin, although he had once sat for a brief period in the common pleas, was wise enough to know that the administration of law required a special education, at least there is no reported opinion by him while president. Of the extra members of the court, Edward Shippen, judge of vice admiralty under the Crown, subsequently became chief justice of the supreme court; Francis Hopkinson has been mentioned and Henry Wynkoop was president judge of Bucks County.

That the Constitution of 1776 was not working smoothly was the opinion of a majority of the council of censors which met in 1783 to consider whether the constitution was being observed and whether it needed amendment. The committee on defects reported that the commissioning of the judges of the supreme court for seven years only was a material defect, because it rendered the tenure of judges dependent on the will of the council, while the committee on abuses reported that the section requiring fixed salaries for the judiciary had not been complied with as it ought and that permanent salaries should without delay be established for the judges during their continuance in office.³ The findings of the censors on these and other points were to bear fruit in the Constitution of 1790.

In 1786 an addition was made to the jurisdiction of the supreme court, which hitherto had exercised no original jurisdiction in civil cases except in fines and common recoveries. By an act of that year issues of

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¹ 3 Smith's Laws of Pennsylvania, 28.

² 1 Dallas's Reports, 95 (1784).

³ Proceedings of the Constitutional Conventions of Pennsylvania of 1776 and 1790, 70, 107.

fact were allowed to be tried *in banc* or at *nisi prius* by that court in the county of Philadelphia.¹

A case that excited considerable interest at the time was the outlawry of Aaron Doan, one of the famous brothers who terrorized Bucks County and the surrounding country. The defendant, having been attainted of robbery, was brought into the supreme court on September 24, 1784, and after hearing before the court upon several exceptions to the outlawry, all of which were overruled, execution was awarded. When the transcript of the record was remitted to the supreme executive council, in order that a warrant for the execution should issue, the humanity of President Dickinson seems to have been shocked that a man should be deprived of his life without a trial by jury and, accordingly, a letter was addressed to the supreme court inquiring whether there were any modern instances in England of persons being executed upon outlawry, or whether that had ever occurred in Pennsylvania, and was compatible with the constitution. Technical objections to the record were also raised.² The court replied that, while not bound to give reasons for their judgment and desiring that this should not be construed as a precedent, they gave it as their opinion that under the laws of the commonwealth and the common law they had no doubt that the prisoner had been properly outlawed and had forfeited his life, but could mention no case in Pennsylvania of a person executed upon outlawry by judicial proceedings alone, except that of one Daniel Dawson, who had been executed since the Declaration of Independence, in consequence of an attainder, by virtue of a proclamation of the supreme executive council and judicial proceedings

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¹ XII Statutes at Large, 308; 2 Smith's Laws of Pennsylvania. 392.

² *Respublica v. Doan*, 1 Dallas's Reports (Wharton's Edition), 86 (1784).

thereon, in which the court awarded execution by sentence of death, no judgment having been given before. Dickinson was still dissatisfied and addressed a special message to the assembly on the subject, but no action was taken at that time and the humane scruples of Dickinson did not influence his successors, Franklin and Muhlenberg, upon the outlawry of the other Doans, Abraham and Levi.¹ In fact except for the objections to the proceedings, as out of harmony with modern ideas, little sympathy would have been wasted on these desperadoes who, from all accounts, richly deserved their sentences. By an Act of September 23, 1791,² the process of outlawry was better regulated, and by the Act of April 22, 1794,³ the death penalty was abolished for all crimes except murder in the first degree.

This reform was largely due to the efforts of William Bradford, who in that year became a judge of the supreme court, resigning a few years later to accept the office of attorney-general of the United States in Washington's cabinet, whose brilliant career was cut short by an early death. Prior to this time the minutes of the supreme executive council are burdened with appeals for executive clemency and numerous orders appear for the remission of corporal punishment, as well as of death sentences. That the council had an eye to dramatic effect, or were convinced of the value of mental suggestions, is indicated by one order in which a reprieve is granted to a prisoner "which the sheriff is not to make known to him until he be taken under the gallows."⁴ Executions were still public and were attended by vast crowds, drawn by the same morbid curiosity as is

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¹ XV Colonial Records, 505, 544; Watson's *Annals of Philadelphia* (1850), Vol. II, 330.

² 3 Smith's *Laws of Pennsylvania*, 37.

³ 3 Smith's *Laws of Pennsylvania*, 186.

⁴ XV Colonial Records, 31.

exhibited by their descendants who feast on the published details of the so-called private executions.¹

In 1790 a new constitution for the state was drafted and adopted by a convention called for that purpose. The old constitution had many defects and the newly adopted constitution of the United States offered a model which many were eager to imitate. In the new constitution the legislative, executive and judicial powers were distinguished and defined according to the now classic American method, and the state was provided with a governor and a senate as well as an assembly. In remodeling the judiciary, the subject with which we are concerned, an earnest but unsuccessful effort was made to establish a court of chancery. The principal changes in the judiciary were embodied in the following clauses of Article V relating to the judiciary:²—

“Sec. 2. The judges of the supreme court, and of the several courts of common pleas, shall hold their offices during good behaviour: But for any reasonable cause, which shall not be sufficient ground for impeachment, the governor may remove any of them, on the address of two-thirds of each branch of the legislature. The judges of the supreme court, and the presidents of the several courts of common pleas shall, at stated times, receive, for their services, an adequate compensation, to be fixed by law; which shall not be diminished during their con-

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¹ 12 Hazard's *Pennsylvania Register*, 117; 13 Hazard's *Pennsylvania Register*, 4. When, in 1783, it was proposed in England to do away with the public procession to Tyburn, Dr. Samuel Johnson remarked, in his vigorous manner, to Sir William Scott: “Sir, executions are intended to draw spectators: If they do not draw spectators, they don't answer their purpose. The old method was most satisfactory to all parties; the public was gratified by a procession; the criminal was supported by it. Why is all this to be swept away?” Boswell's *Life of Johnson*, chapter 56.

² Proceedings of the Constitutional Conventions of Pennsylvania of 1776 and 1790, 301, and 3 Smith's *Laws of Pennsylvania*, xxxix.

tinuance in office; but they shall receive no fees or perquisites of office, nor hold any other office of profit under this commonwealth.

"Sec. 3. The jurisdiction of the supreme court shall extend over the state; and the judges thereof shall, by virtue of their offices, be justices of oyer and terminer and general gaol delivery in the several counties.

"Sec. 4. Until it shall be otherwise directed by law, the several courts of common pleas shall be established in the following manner: The governor shall appoint in each county, not fewer than three, not more than four judges, who, during their continuance in office, shall reside in such county: The state shall be, by law, divided into circuits, none of which shall include more than six, nor fewer than three counties. A president shall be appointed of the courts in each circuit, who, during his continuance in office, shall reside therein. The president and judges, any two of whom shall be a quorum, shall compose the respective courts of common pleas.

"Sec. 5. The judges of the court of common pleas in each county shall, by virtue of their offices, be justices of oyer and terminer and general gaol delivery, for the trial of capital and other offenders therein; and two of the said judges, the president being one, shall be a quorum; but they shall not hold a court of oyer and terminer or gaol delivery in any county, when the judges of the supreme court, or any of them, shall be sitting in the same county. The party accused, as well as the commonwealth, may, under such regulations as shall be prescribed by law, remove the indictment and proceedings, or a transcript thereof, into the supreme court."

The most important changes, as will readily be seen, were the restoration of life tenure to the judges and the grouping of the counties into circuits with a president for the common pleas courts therein, a measure rendered necessary by the growth of the state, particularly in the West. By the appointment of judges learned in the law to preside over the lower courts in the respective circuits some measure of relief was afforded to the supreme court, whose work was becoming increasingly arduous.

By the Act of April 13, 1791,¹ the courts were established in conformity with the new constitution. The supreme court was required to hold three terms a year and courts of *nisi prius* in the intervals. The state was divided into five circuits or districts (increased in 1806 to ten), each comprising a group of counties, and for each district a president judge learned in the law was appointed by the governor who, with not less than three, or more than four other persons, commissioned as judges for each of the counties in the circuit, formed for such counties, respectively, the courts of common pleas, oyer and terminer, quarter sessions and orphans' court. The president and any two of the judges, with the register of wills, comprised the register's court.

In cases involving more than four hundred dollars, a writ of error lay from the supreme court and the register's court to the high court of errors and appeals, which was also remodeled, and, under this act, comprised the judges of the supreme court and the presidents of the common pleas, with three other persons of known legal ability commissioned in the same manner as the judges of the supreme court. It was further provided that such judges as should have given judgment below should be excluded from sitting on the hearing of that cause on appeal. The high court of errors and appeals sat once a year in Philadelphia. On the organization of this court Benjamin Chew, the former provincial chief justice, was named as an extra member and was made president of the court, the other extra places not being filled.

By another act of the same date the salaries of the judges were fixed as follows: Chief justice of the supreme court £1000, associate justices and president judge of first district £600, presidents of other districts £500.²

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¹ 3 Smith's Laws of Pennsylvania, 28.

² April 13, 1791, 3 Smith's Laws of Pennsylvania, 26.

When it is remembered that these are not pounds sterling, but Pennsylvania currency, the modesty of the salaries is but too evident. Thirty shillings a day were allowed to each justice of the supreme court for traveling expenses when on circuit. In 1796 the salaries of the associate justices and the president of the first district were raised \$400 and of the other presidents \$266.67. At the time of the Constitutional Convention of 1837, the salary of the chief justice of the supreme court was \$2666 and of the associate justices \$2000 each, with an allowance for mileage and expenses on circuit. The judges of the district courts were paid \$2000 each, as well as the judges of the common pleas for the first judicial district. In the other districts the president judges of the common pleas received \$1600 and the associates \$140 with mileage.¹

In 1799, further changes were made in the jurisdiction of the courts, which for some time were the subject of constant legislative experiments. As the population grew, the impracticability of keeping up the system of *nisi prius* sessions of the supreme court became more and more obvious, while to the suitors and the bar, the hardship and expense of crossing the Alleghenies to attend a session of the court *in banc*, at Philadelphia, in the days before railroads, amounted to a denial of justice. But the bar was not yet prepared to give up its inherited fondness for itinerant justice, and the courts of common pleas of the newly established judicial districts had not been long enough in operation to be recognized as the true solution of the problem. The Act of March 20, 1799,² therefore provided that instead of *nisi prius* courts, there should be held, except in the county of Philadelphia, circuit courts which were

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¹ Debates of Pennsylvania Constitutional Convention of 1837, Vol. 1, 263.

² 5 Carey & Bioren's Laws of Pennsylvania, 694.

of the same nature as the court of *nisi prius* except that the judges holding the same were empowered to give judgment, pass decrees and award execution in as ample a manner on circuit as when sitting *in banc*. The right of appeal to the supreme court was preserved under special conditions.

Although not required by the act by which these courts were constituted, it continued to be the practice, as before, for two judges to ride on circuit and sit together at trials in these courts. This was unnecessary, as the time of the judges could have been better distributed by sitting singly on jury trials, while trials conducted by two judges were subject to the same inconvenience as when conducted by the four judges sitting *in banc*, which, as Judge Brackenridge has remarked,¹ caused great delay, as documents offered in evidence had to be read by all the judges in turn and a note taken by each.

Trials *in banc* were abolished in Philadelphia by the Act of February 24, 1806,² which also established a western district for the supreme court, which was required to hold its September term at Pittsburg. It was also provided that in the future circuit courts should be held by one judge and that the judges should alternate so that the same judge would not sit oftener than once in the same county in every fourth successive term. The act also abolished the high court of errors and appeals and vested its powers in the supreme court. As respects the common pleas, the state was divided into ten judicial districts and a president judge appointed in each of the new districts. It was further provided that whenever required by either party or counsel the judge should reduce his opinion to writing with his reasons and file the same of record in the cause.³

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¹ Brackenridge's Law Miscellanies, 283.

² 4 Smith's Laws of Pennsylvania, 270.

³ See also the Act of March 6, 1812 (5 Smith's Laws of Pennsylvania, 308).

By an act of April 10, 1807,¹ a middle district was established for the supreme court, the term to be held at Sunbury, and again in 1809² two additional districts were established, the Lancaster district, and the southern to be held at Chambersburg. By this act the circuit courts were abolished, and the cases undetermined therein relegated to the common pleas or, where appeals were pending, to the supreme court. The number of judges of the supreme court was reduced from four to three. By another supplement to the Act of 1806, enacted in 1810,³ the original jurisdiction of the supreme court was restored in Philadelphia County in cases involving over \$500, the judges being required to hold *nisi prius* courts there thirty-three weeks in the year.

To dispose of the accumulation of business a new court called the district court was created for the city and county of Philadelphia, by the Act of March 30, 1811,⁴ to consist of a president and two assistant judges with power to hear and determine all civil pleas and actions where the sum in controversy exceeded one hundred dollars. The act was experimental and limited to six years, but the court was such an unqualified success that it was continued, made permanent, and similar courts established later in Pittsburg and Lancaster. From the first this court absorbed the most important legal business of the county and acquired an "enduring reputation as a great law court for the trial of civil issues,"⁵ the greatest this commonwealth has ever seen; but the names of its most famous judges belong to a later period.

No further experiments were tried with the supreme court until 1826, when an act was passed increasing the

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¹ 4 Smith's Laws of Pennsylvania, 448.

² March 11, 1809, 5 Smith's Laws of Pennsylvania, 15.

³ March 10, 1810, 5 Smith's Laws of Pennsylvania, 158.

⁴ 5 Smith's Laws of Pennsylvania, 223.

⁵ Martin's Bench & Bar, 78.

number of justices to five and restoring the circuit courts.¹ The cup of that overworked body was now full. They were required to hear all cases of error and appeal sitting in six districts, to hold a court of *nisi prius* in Philadelphia, to go on circuit through the counties, beside exercising original jurisdiction in cases of *quo warranto* and *mandamus*. Relief came in the Act of April 14, 1834,² passed on the recommendation of the commissioners appointed to revise the civil code. Circuit courts were finally abolished and the number of districts reduced to four (the eastern at Philadelphia, northern at Sunbury, middle at Harrisburg and western at Pittsburg); courts of *nisi prius* continued to be held twice a year in Philadelphia by a single justice for the trial of civil actions involving more than five hundred dollars, reviewable by the court *in banc* upon motions for new trial or in arrest of judgment.

At the risk of being tedious we have briefly reviewed the many changes in the judiciary system between the Revolution and the revision of the civil code in 1834-36, touching on these acts in but a cursory manner without attempting to point out many important features which were incorporated into later legislation and became a permanent part of the system. The changes made were many of them experimental, some met with success, others were doomed to failure; they were forced by the extraordinary growth of the commonwealth in population and wealth and the increase in the amount and importance of the business of the courts. The law of real estate still had first place, land was the principal asset of the inhabitants, and the loose methods of the land office were an invitation to litigation, not to

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¹ April 8, 1826, P. L. 265.

² P. L. 341. See Fourth Report of the Commission to Revise the Civil Code (1834). The northern district of the supreme court was afterwards abolished.

speak of the additional complications arising from Connecticut and Virginia titles. Ejectments innumerable occupied the attention of the courts. But commercial law was every day becoming more important, particularly in Philadelphia, then the first city in the country and for some years the nation's capital. The legal profession enjoyed great prosperity during the early days of independence; recklessness and paper money inflation had increased private debts to an enormous extent and this, with the settlement of the loyalists' estates, filled the dockets with more cases than could be tried. This naturally led to envy and jealousy of the bar, which in Massachusetts culminated in riots directed against the courts, an incident referred to in history as Shays' rebellion.¹

In Pennsylvania there was no open attack on the courts while McKean was chief justice, whose stern judicial deportment and inflexible courage were sufficient to awe the mob. No one could doubt his devotion to the cause of independence, but if a democrat in theory he was an aristocrat in bearing. David Paul Brown relates² that "shortly after his appointment, a petition was presented to him directed to the Right Honorable Thomas McKean, Esq., lord chief justice of Pennsylvania, upon which he complacently observed—'these are, perhaps, more titles than I can fairly lay claim to, but at all events the petitioner has erred on the right side.' " Court was, in his time, opened with great ceremony and form, and the chief justice held the attendants to a rigid observance of duty. There are several cases which illustrate this jealousy of the authority of the court, of which the famous libel case *Respublica*

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¹ McMaster's History of the American People, Vol. I, 302, *et seq.*

² The Forum, Vol. I, 327.

v. *Oswald*,¹ may be taken as an example, as well as the following incident stated by Brown to have occurred in 1778. The chief justice had issued a warrant for the arrest of Colonel Robert L. Hooper, a deputy quartermaster, on a charge of libel. Colonel Hooper informed General Greene, who wrote to the chief justice stating that there was no one to fill the colonel's place and requesting that he might be permitted to enter into a recognizance to appear at court later. The chief justice replied as follows:—

“Yorktown, June 9th, 1778.

“Sir:—I have just now received your favor of the 3d inst., and am not a little surprised that the sheriff of Northampton county should have permitted Colonel Robert L. Hooper, after he was arrested by virtue of my precept, to wait upon *you* until he appeared before *me*.

“You say, sir, ‘Colonel Hooper waited upon me to communicate his situation, and to know if the circumstances of the army would admit of his absence; but, as the army is just upon the wing, and part of it will, in all probability, march through his district, I could not, without great necessity, consent to his being absent, as there is no other person that can give the necessary aid upon this occasion.’

“I do not think, sir, that the absence, sickness, or even death of Mr. Hooper could be attended with such a consequence, that no other person could be found who could give the necessary aid upon this occasion; but what attracts my attention the most, is your observation that *you* cannot, without great necessity consent to his being absent. As to that, sir, I shall not *ask* your consent, nor that of any other person, in or out of the army, whether *my precept* shall be obeyed or not in Pennsylvania.

“The warrant for the arrest of Mr. Hooper being special, no other magistrate can take cognizance thereof but myself. The mode you propose, of giving bail, cannot be adopted, for many reasons.

“I should be very sorry to find that the execution of criminal law should impede the operations of the army, in any instance; but much more so to find the latter impede the former.

“I am, sir, with much respect,

“Your most obedient, humble servant,

Thomas M’Kean.”²

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¹ 1 Dallas’s Reports, 319 (1788).

² The Forum, Vol. I, 330.

In 1799 McKean was elected governor and was succeeded on the bench by Judge Shippen, then seventy years old, who had studied under Tench Francis and at the Middle Temple. Chief Justice Shippen was a patient, practical and discriminating lawyer and it was from his notes that the first reported cases in Pennsylvania were taken. He indeed formed a connecting link between the courts of the province and those of the commonwealth, having sat on the bench during both periods. This very fact, which caused him to be venerated by the bar, was calculated to increase the hatred with which he and his colleagues, Yeates and Smith, were regarded by the radical politicians. The three judges from their wealth and social connections were regarded as representatives of the old aristocracy, while the defeat of the Federalist party, in 1799, left those who had taken office in its day of power exposed to all the dangers of political revenge. The tenure of the judiciary was for life and it filled the earnest partisans of the new democracy with rage to see all the places on the bench filled with those whose sentiments were scarcely less detested than those of the Tories.

The first to be marked for attack was Alexander Addison, president judge of the fifth judicial district, which, when formed in 1791, comprised Westmoreland, Fayette, Washington and Allegheny Counties, all of the western part of the state. Addison, a Scotchman by birth, had been educated for the ministry, but had changed to the law, and while practicing in the western counties had served as a member of the convention that framed the Constitution of 1790. An aggressive Federalist, his views were out of harmony with those of the greater portion of the local population, while his strong opposition to the Whiskey Insurrection did not increase his popularity with the rough inhabitants of that wild region. It was Addison's habit to deliver political ser-

mons from the bench under the guise of charges to the grand jury. These interminable discourses were published and greatly admired by the Federalists, but detested by the Democrats, who, in attending court as parties or jurors, were obliged to listen respectfully to the heavy campaign literature of their opponents.¹ Judge Addison was particularly fond of dwelling upon the enormities of the French revolutionists as a warning to good citizens against those admirers of that revolution who were prominent among the Anti-Federalists. Aside from these foibles, Addison was an able, upright and energetic judge, and had toiled ceaselessly to bring order out of confusion in the western district. His learning was regarded with respect by the bar and his firmness had won the confidence of the better class of citizens. When the party of Jefferson triumphed in 1799, Addison was the first victim of their revenge. His leading enemy was, like himself, a theologian who had turned to the law, had built up an extensive practice and had just been appointed to the supreme court, Hugh Henry Brackenridge, of whom more hereafter.

Instigated by Brackenridge, John B. C. Lucas, a justice of the peace, unlearned in the law, at the court of quarter sessions of Allegheny County, attempted to address the grand jury and was prevented by Judge Addison on the ground that in such matters the president judge was the mouthpiece of the court. Lucas brought the matter before the supreme court on a motion for leave to file an information against Addison for misconduct on the bench, but the court declined to interfere, although of opinion that the associate judges had a right to express their opinions.² Lucas again attempted, at the court held June 22, 1801, to address

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¹ See specimens of these charges in Appendix to Addison's Report.

² *Commonwealth v. Addison*, 4 Dallas's Reports, 225 (1801).

the grand jury and was again prevented by Judge Addison with the concurrence of another colleague. The paper Lucas intended to read had nothing to do with the duties of the jury, but contained some trifling remarks of a semi-political nature, composed perhaps by Brackenridge.¹ For this act Addison was impeached by the house of representatives on January 26, 1803, convicted by the senate, by a vote of twenty to four, and sentenced to be removed from office and forever disqualified from holding the office of judge in the commonwealth. Judge Agnew has described this trial as "the most flagitious ever urged on by vicious hate and obnoxious partisanship,"² and the conduct of the legislature in this matter has met with general reprobation. Under the circumstances Addison had acted perhaps injudiciously, but his purpose was to preserve the dignity of the court and the punishment he received was unreasonably harsh.

Having tasted blood, the legislature next turned its attention to the supreme court. In February, 1803, a petition was presented to the house of representatives by one Thomas Passmore, complaining that he had been arbitrarily fined and imprisoned for a constructive contempt of court in violation of the bill of rights and praying for the impeachment of the judges who had taken part in the proceedings. The matter went over to the following session when it was referred to a committee which recommended the impeachment of Chief Justice Shippen and Justices Yeates and Smith, and accordingly, articles of impeachment, adopted on March 23, 1804, were presented to the senate. On January 5, 1805, at Lancaster, then the capital of the state, the

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¹ See the printed report of Addison's Trial (1803).

² Address before the Allegheny Bar Association, Pennsylvania Magazine, Vol. xvi, 1.

trial began. The cause of this impeachment was a proceeding in the supreme court, which will be found reported in the case of *Bayard v. Passmore*.¹ The brig *Minerva* belonging to Passmore, which had been insured in 1801 by certain underwriters including the firm of Petit and Bayard, sprang a-leak and put into New Brunswick where Passmore abandoned her to the underwriters. Some of the latter refused to pay on the ground that the vessel was unseaworthy when she sailed. An amicable action was entered and the matter referred to arbitrators, who made an award in favor of the plaintiff. Judgment was entered on the award and a *fi. fa.* issued, but, on motion, the execution was set aside, and a rule granted to set aside the award, on exceptions filed by the defendant. These exceptions were based partly on irregularities in the proceedings and partly on the merits of the case. While the exceptions were pending, Passmore, who seems to have been exasperated at the delay, posted on a board in the exchange room of the city tavern the following notice:—

"The subscriber publicly declares, that Petit and Bayard, of this city, merchants and quibbling underwriters, has basely kept from me the said subscriber for nine months about 500 dollars, and that Andrew Bayard, the partner of Andrew Petit, did on the 3d or 4th inst. go before John Inskeep, esq., aldermen, and swore to that which is not true, by which the said Bayard and Petit is enabled to keep the subscriber out of his money for about three months longer, and the said Bayard has meanly attempted to prevent others from paying the subscriber about 2500 dollars but in this mean and dirty action he was disappointed in; I therefore do*publicly declare, that Andrew Bayard is a liar, a rascal and a coward, and do offer two and a half per cent. to any good person or persons to insure the solvency of the said Bayard and Petit for about four months from this date.

"Philadelphia, September 8, 1802.

"Thomas Passmore."

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¹ 3 Yeates's Reports, 438 (1802).

Thereupon Mr. Dallas, the attorney for Bayard and Petit, moved for an attachment against Passmore for contempt of court, which was granted and interrogatories filed, which Passmore answered. On the issuing of the attachment the court expressed its opinion that an apology was due to the defendants. The answer of Passmore disclaimed any intention to treat the court with contempt and admitted that the paper had been posted in a moment of irritation but declined to make an apology to the defendants. It was argued that there was no suit pending when the notice was posted, the proceedings having closed with the award of the arbitrators, but the court held otherwise, being of the opinion that a contempt had been committed. As Passmore declined to make any atonement to the injured individuals which would influence the court to leniency, he was sentenced to pay a fine of fifty dollars and suffer imprisonment for thirty days. This sentence was carried out.

As the law then stood Passmore was clearly guilty, and even if not, the sentence was given after a patient hearing and full argument and amounted at most to an error of law, for which Passmore had a remedy by appeal to the high court of errors and appeals, a point upon which he was advised by William Lewis, one of the leaders of the bar. But this remedy was not pursued. Passmore paid his fine, served his sentence and sought revenge by the aid of a partisan assembly.

When the time of the trial arrived public feeling had turned in favor of the judges, the better class of newspapers took their side and the bar rallied to their defense; in fact the assembly found it impossible to procure eminent local counsel to assist them in their odious task and Cæsar A. Rodney of Delaware, was retained for the prosecution. The defendants were represented by Jared Ingersoll and Alexander J. Dallas.

The trial began on the eighth of January, 1805, and lasted until the twenty-eighth of the month.¹ Many witnesses were called and all the litigation which gave rise to Passmore's commitment was minutely reviewed. In summing up Mr. Boileau, one of the managers for the house, argued that Passmore had not been punished because he had committed a contempt of court but because he would not apologize to Bayard, and declared that the court had no authority to direct one individual to apologize to another. His address was a violent attack on English precedents and the legal profession in general, with the usual platitudes on the rights of man and the principles of the Revolution. Mr. Rodney's speech was more dignified and it is apparent that his task was uncongenial. For the defense the speeches of Dallas and Ingersoll were brilliant and exhaustive, replete with reported precedents as well as manuscript records, which their industry had discovered and which throw much light on the early practice of the courts in attachments. That any doubt could be felt as to the issue of this trial is a matter for wonder, and that thirteen out of twenty-four senators voted for conviction is a lasting disgrace to their names. Fortunately, the prosecutors failed by three votes to obtain a two-thirds vote, and the judges were declared acquitted.

One incident of the trial deserves mention. Judge Brackenridge was not on the bench when the motion for the attachment of Passmore was made, and at the time of the argument was returning from a special court in Northumberland County, but was present when sentence was passed. He was not included in the impeachment, but at once wrote to the house of representatives stating that he concurred in the opinion of his brethren, and while not courting prosecution, could see no distinc-

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¹ See printed report of the Judges' Trial (1805).

tion in his case and asked to be included in the impeachment. The house sent up an address to Governor McKean for his removal, which was refused, and when a committee urged that the term in the constitution "may remove" meant "must remove," he replied that he would have them know that "may" sometimes meant "won't."¹

This offer to stand impeachment with his colleagues was the most courageous act in the public career of the most eccentric genius that ever sat on our supreme bench, about whom a few words may be interesting. Hugh Henry Brackenridge, born in Scotland, of poor parents, was brought as a child to this country. By teaching school he saved enough to attend Princeton College, where he became a tutor, studied divinity and later served as a chaplain in the Revolutionary army. In 1778 he commenced the study of law with Samuel Chase, afterwards a justice of the supreme court of the United States, and, locating at Pittsburg, soon became a leader of the western bar. During the whiskey insurrection Brackenridge's conduct was not free from suspicion. His opinions were opposed to the excise tax, and, if he did not join the insurgents, he did not take a very firm stand against them. He was marked for arrest by Hamilton, but was saved, it is said, by James Ross, the rival bar leader of the western district, afterwards United States senator. At the bar Brackenridge was noted for his shrewdness, wit and eloquence, and was a writer of considerable talent; "Modern Chivalry," a satirical work from his pen, has gone through several editions. On the bench he did not display the same power as at the bar; his opinions were racy, but not profound and failed to do justice to his real learning; an untiring student, his dislike of convention led him at times into a show of flippancy. The enmity between

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¹ The Forum, Vol. I, 408.

Judges Yeates and Brackenridge was a curious incident of the times. It probably dated from the time of the whiskey insurrection when Yeates served as one of the commissioners to deal with the insurgents. No two men were ever more dissimilar in appearance, habits and opinions: Judge Yeates a tall, florid, portly man, rich, aristocratic and fond of society; Brackenridge dark and sallow, of moderate means, a bookworm and recluse, and absolutely indifferent to his appearance. An examination of the reports will show that the associates rarely agreed, and the position of Chief Justice Tilghman must have been peculiarly difficult. Indeed the eccentricities of Brackenridge, if half the traditions are true, would almost amount to insanity, but it is difficult at this day to say whether his want of judicial decorum arose from this cause or from his utter contempt for social conventions. Among the odd stories told of him is one narrated by David Paul Brown:¹—

“During the time, as has been said, the circuits existed, a friend of the judge, riding in his carriage in the western part of the state, while a prodigious storm of wind and rain prevailed, saw a figure approaching, which resembled, what might be conceived of Don Quixote, in one of his wildest moods; a man, with nothing on but his hat and boots, mounted upon a tall, raw-boned Rosenant, and riding deliberately through the tempest. On nearer approach he discovered it to be Judge Brackenridge, and upon inquiring what was the cause of the strange phenomenon, Brackenridge informed him, that seeing the storm coming on, he had stripped himself and put the clothes under the saddle; ‘because,’ said he, ‘though I am a judge, I have but one suit, and the storm, you know, would spoil the clothes; but it couldn’t spoil me.’ ”

The interminable criticism of and complaints against the judiciary during the early years of the nineteenth century were in a large measure due to the fact that

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¹ The Forum, Vol. I, 404.

judges held office for life. The same processes were to be seen at work in the other states, culminating in the abolition of life tenure and the substitution of a term of office varying, under the different constitutions, from one to twenty years. In Pennsylvania this result was accomplished by one of the constitutional amendments adopted in 1838, by which the terms of the supreme court judges were fixed at fifteen years and those of the common pleas judges at ten. This change was not adopted without vigorous opposition on the part of the leaders of the bar¹ and is a subject upon which opinions differ today. We may suspect that, however loudly the political leaders who advocated the change may have declaimed against the dangers of caste prejudice, favoritism and despotic conduct, they were really looking at the offices with envious eyes and plotting to divert the meagre salaries to partisan purposes. This was the period when American political life, in its outward aspects at least, reached its lowest depths of degradation, and that the judiciary should suffer thereby was inevitable. Americans had yet to learn that democracy was not synonymous with vulgarity and provincialism, that the American Revolution had not severed us from the traditions of our race, and that the French Revolution had not emancipated us from the rules of social decorum. The American "Sans Culotte" was an unlovely type, an iconoclast and a bitter partisan, and that he should have done his best to add the judiciary to the spoils system is not the least count in his indictment.

The citation of English decisions in the opinions of the courts greatly exasperated the radical element. What were these precedents but the rags of despotism, who were the judges that had rendered them but tyrants,

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¹ Debates of Pennsylvania Constitutional Convention of 1837, Vol. X, 148 *et seq.*

sycophants, oppressors of the people and enemies of liberty! There was danger that our courts might be contaminated by the source from which they drew their inspiration, so an act was passed March 19, 1810,¹ which provided that it should not be lawful to read or quote in any court of this commonwealth, any British precedent or adjudication which had been given or made subsequent to the fourth of July, 1776, except those relating to maritime law or the law of nations. Upon this act Judge Brackenridge wittily remarked:²—

“Were it not that I should be unwilling to enter into a contest with the legislature, where public opinion, or prejudice is on their side, I might be disposed to question the constitutionality of this act. It would seem to be abridging the right of the judiciary, to hear all reason on a question before them.

—————What is't to us
Though it were said by Trismegistus?

“But if we are to hear the saying of a lord, years, or centuries ago; and before the 4th July, 1776, why not what another lord has said since, to explain or contradict the adjudication? The fact is, early decisions were, many of them narrow; and why drink out of the neck of a gourd, rather than out of an open goblet; more especially if the fountain was muddy, out of which the gourd was filled; the stream of law in that country, now runs more clear in particular cases than centuries ago; and it will always remain so, the law being an improvable science.”

This act was repealed in 1836.³

It may be said, however, for those who railed against the courts, that many of the lay associate judges set anything but a good example of judicial dignity, and quarreled even to the point of coming to blows and drag-

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¹ P. L. 136. See similar Act in New Jersey passed in 1799. New Jersey Statutes (1800), 436.

² Brackenridge's Law Miscellanies, 525.

³ Act of March 29, 1836, P. L. 224.

ging each other from the bench.¹ The law judges, who rode the circuits, manfully attempted to preserve in the log court houses of remote counties the dignity of Westminster Hall, and added to their unpopularity with the uncouth inhabitants by instructing them in manners as well as in the law. In his "Recollections of the West,"² Judge Brackenridge's son, himself also a judge, gives an amusing picture of the first court held in Butler County. The court house was a log cabin into which bench, bar and the entire village population were crowded. The audience hung from the rafters like bats, and when these were cleared away by the sheriff, a big Irishman objected to being removed. The Court sentenced him to an hour's imprisonment for contempt, whereupon the sheriff was greatly puzzled as to what he should do with his prisoner, as there was no jail. It was finally decided that he should be incarcerated in a pig pen, emptied to prepare a feast for the court, but the prisoner was too much for his captors and made his escape into the brush.

Rapid as was the tide of immigration into western Pennsylvania it was only by slow degrees that a well organized system of local government was introduced. Westmoreland County, comprising most of the western district, was established in 1773 with a county seat at Hannastown, but the confusion incident to the Revolution and the boundary dispute between Pennsylvania and Virginia retarded the growth of local institutions. Court was held at the house of Robert Hanna where petty offenders were sentenced to the pillory, stocks and whipping post, erected before the log jail. The first person, it is said, convicted of murder and hanged west of the Alleghenies was an Indian of the Delaware tribe

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¹ McMaster's History of the American People, Vol. III, 154.

² Recollections of the West, H. M. Brackenridge. See extract in Hazard's Pennsylvania Register, Vol. XIV, 172.

named Mamachatoga, who in 1785, while drunk, killed a white man near Pittsburg. At the trial at Hannastown he was defended by Brackenridge, but Chief Justice McKean who presided held that drunkenness was no excuse and the defendant suffered the extreme penalty of the law.¹ In the early days when the fifth judicial district embraced practically all of western Pennsylvania litigation was slow, owing to the long intervals between the terms of court and the difficulty in procuring the attendance of witnesses. The law judge rode the circuit from county to county, attended or followed by the members of the bar, who, during the sessions of court, generally put up at one tavern and made a lively time of it.

During the early years of the nineteenth century the supreme court was presided over by chief justices of reputation equal to any, and superior to most of those who have sat in American state courts, Tilghman and Gibson. William Tilghman came of a family of distinguished lawyers; his father was secretary of the provincial land office, and his maternal grandfather, Tench Francis, the bar leader of the provincial court of his time. His first judicial appointment was by President Adams on March 3, 1801, to the circuit court of the United States for this circuit; hence he was one of the so-called "midnight judges," commissioned a few hours before Jefferson took office, and legislated out of office in the following year. In 1806 he was appointed chief justice by Governor McKean on the recommendation of his cousin, Edward Tilghman, who declined the office. His appointment gave offense to some of the minor Democrats, but the governor, although a leading member of that party, having once made up his mind on the subject, was not to be moved.

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¹ History of Allegheny County (Errett), chapter xiv.

"A committee, consisting of Duane, Lieper, and others, were appointed by a town meeting to wait upon him, to inform him that the democracy of Philadelphia were utterly opposed to the nomination of William Tilghman as chief justice of Pennsylvania. The committee were introduced into the executive apartments, and the governor received them in his civil but reserved and aristocratic manner, treating them simply as his constituents; when, however, they announced themselves as the representatives from the democratic party—the sovereign people—he bowed most profoundly, and inquired of them what the great democracy of Philadelphia required of him. They proceeded, and stated the purposes of their delegation, and in pretty plain terms gave him to understand that the appointment of Mr. Tilghman would never meet the approval of the democratic party. 'Indeed,' said the governor, 'inform your constituents that I bow with submission to the will of the great democracy of Philadelphia; but by G—d, William Tilghman *shall be* chief justice of Pennsylvania.'"¹

The confidence of the governor was justified by the long and distinguished career of his appointee, whose judicial decisions are marked by a comprehensive knowledge of the common law and an unusual clearness of diction. "Other Judges," says Binney, "may have had more learning under their immediate command,—none have had their learning under better discipline, or in a condition more effective for the duty upon which it was employed."²

An adequate life of his great successor, John Bannister Gibson, has still to be written.³ Appointed to the common pleas in 1812 and to the supreme court in 1816, of which he became chief justice in 1827, his reputation increased with years, and common consent assigns to

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¹ The Forum, Vol. I, 343.

² See Binney's Eulogy on Chief Justice Tilghman, 16 Sergeant & Rawle's Reports, 444.

³ See Eulogies in Appendix to 19 Pennsylvania Reports; W. A. Porter's Essay and article in Great American Lawyers, Vol. III, 353.

him the first place in our judicial history. "Abroad," said Chief Justice Black, "he has for many years been thought the great glory of his native state." Chief Justice Gibson has been credited with an abhorrence of the petty and prosaic details and drudgery of the law, qualities that would have militated against a successful career as an advocate, but given a problem, no judge could grasp it more firmly or dispose of it more readily, and he was master of a style which in vigor of expression and condensation of thought is unrivalled. "When he brought the lens of his mind to a focus, its power was resistless." For one act in his career he was subjected to some criticism. The constitutional amendments of 1838 substituted a term of fifteen years for life appointment and the commissions of the judges on the bench were to expire at intervals of three years. At the suggestion of his colleagues, the chief justice resigned in 1838, and was immediately reappointed, and thus, instead of holding for the shortest term, enjoyed the longest. The necessity for this action was no doubt humiliating to him, who could hardly have resumed practice at that period of his life, but on the other hand his loss to the state would, at that time of transition, have been irreparable, and when his term expired in 1851, he was re-elected almost without opposition.

If space permitted, it would be proper to say something of the bar at this time, which was particularly distinguished.

During the greater part of this period Philadelphia was the leading city of the nation, both in population and wealth, and the achievements of the local bar attracted national attention.¹ Such leaders as William Lewis,

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¹ See the reprints and papers contained in the volume commemorative of the One Hundredth Anniversary of the Philadelphia Law Association.

Edward Tilghman, Jared Ingersoll, William Rawle, William Bradford, Alexander James Dallas, and Horace Binney, both in private practice and public office, exhibited talents that were admired and esteemed by their contemporaries and served as models for their students and successors, while in the West Albert Gallatin, James Ross and H. H. Brackenridge attained high distinction. Indeed, so much has been said about the good old times, that we are often in danger of minimizing professional progress, which, in the nineteenth century, has been in the nature of a world-wide forced march to keep pace with the flying wheels of Father Time's steam and electric chariots.

The first bar after the Revolution was a very remarkable body; most of its leaders had been educated at the Inns of Court or in offices steeped in black-letter traditions. Devoted to the common law, they endeavored to inspire their pupils with the same spirit. Deprived by legislative shortsightedness of a court of equity they applied to the problem of working out equitable relief through common law forms the same sort of ingenuity that their ancestors had exercised in the invention of fictions to overcome the inelasticity of common law actions. Masters of their profession, they were jealous of all innovation, and the less important members of the bar took their cue from the leaders, in blissful ignorance of the issues involved. As a result the agitation for codification that subsequently swept over the country was but faintly echoed in Pennsylvania.

In pursuance of resolutions adopted by the legislature in 1830 a commission was appointed by the governor consisting of William Rawle, T. I. Wharton and Joel Jones, to revise, collate and digest all such public acts and statutes of the civil code of the state and all such British statutes in force in the state as were general and permanent in their nature. The commission made a

series of reports between 1831 and 1836 with drafts of proposed acts, most of which were, with some modifications, enacted into law.¹ That the members did their work thoroughly and well is proved by the fact that the acts passed on their recommendation are the basis of the present jurisdiction of and practice in the courts of the commonwealth. Their work, however, consisted mainly in repairing, restoring and strengthening the existing structure, a statutory system supplemented by so much of the common law as it had been found expedient to incorporate into the jurisprudence of a new community. Their cautious recommendations accorded with conservative public opinion, and the house-cleaning then done tended, undoubtedly, to check the sentiment for codification which has had such extraordinary results in England as well as in many of the states.² Whether this is a blessing or a curse is a question upon which opinions may differ. At least, it may be suggested that three-quarters of a century has passed since this revision, during which time many statutes have been enacted which do not add clarity to the law, and that it may be worth while to examine some of the more notable procedural reforms, with a view to the introduction of such methods as have proved unqualifiedly successful elsewhere and the ultimate simplification of our procedure, in the interest of common sense and social and economic progress. Self-laudation is one of our professional faults that frequently leads to narrow views and unprogressive provincialism. A peep over our neighbors' fences may lead us to the horrifying discovery that we are provincial in many respects.

The revision of the civil code has been fixed as the limit of this discussion for the reason that there are

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¹ The reports of the commissioners form a most instructive commentary upon the early statute law of Pennsylvania.

² Hepburn's *Historical Development of Code Pleading* (1897).

members of the bar who can speak with authority from personal recollection upon the occurrences during the middle nineteenth century, and for the further reason that the judicial system had by that time assumed a form which in its main outlines, it still retains, subject to the changes introduced by the constitution of 1874.¹ Relief has since been afforded to the supreme court by the establishment of an intermediate court of appeal, the superior court, and the transfer to the latter of a part of the appellate business.² Both are courts for the hearing of appeals, none of the judges sitting at *nisi prius*, an arrangement that has been criticised as tending to disassociate the appellate judges from the main body of the judiciary, in contradistinction to the federal system. The number of common pleas judges has been greatly increased and the lay associate has almost disappeared.³

The most glaring defect in the system is in the minor judiciary. The magistrate, or justice of the peace, is a relic of the eighteenth century whose intelligence, education and social position have not kept pace with the general improvement. The holding of courts at this day by men unlearned in the law is an anachronism, a nuisance to those having to do with the collection of small debts and, frequently, a source of oppression to the poor. It is to be hoped that reform in this respect will not be unduly delayed by the necessity for the adoption of amendments to the constitution to make it complete.

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¹ The Judiciary Article of the Constitution of 1874 is printed in the Appendix to this volume. Special pleading was abolished by the Act of May 25, 1887, P. L. 271, which substituted a hybrid system that is neither common law nor good code pleading.

² Act of June 25, 1895, P. L. 212, and its supplements.

³ For the present personnel of the courts, see Smull's Legislative Handbook, current issue.

The early division of the state into judicial districts has had some unfortunate consequences. The bar of the state became divided into a number of local bars, mutually jealous and exclusive, practicing under dissimilar rules, without common interests or *esprit de corps*. The tendency to disunion has been checked by the formation of the State Bar Association, an organization that has already done much to promote uniform legislation as well as to encourage good fellowship in the legal fraternity. The appointment, too, by the supreme court of a state board to examine candidates for admission to the bar has done much to standardize legal education in the state.

Owing largely to her great natural resources Pennsylvania has enjoyed a prosperity in which both bench and bar have shared, but the first stages of that prosperity were attained through the liberal and farsighted policy of William Penn, the founder. His adopted sons should at least be willing to view with open minds the innovations demanded by progress. The panorama from the housetop does not necessarily lead to a suicidal leap or a broomstick ride.

CHAPTER IV.

One of the most troublesome questions with which the colonial administrator had to deal was equity jurisprudence. In the early years of the seventeenth century politics entered into the contest for jurisdiction between the English court of chancery and the courts of common law, beclouding the issues and retarding a settlement of their respective spheres of action. Popular dislike pictured the chancellorship as a great political office closely identified with the Crown, and grudgingly admitted its importance in the complex judicial system of England. On the other hand, the chancellor too frequently subordinated the judicial functions of his office to ministerial policy and permitted abuses in the organization and administration of his court that impaired its usefulness and checked the growth of its business. At this early period chancery practice was concerned chiefly with questions connected with the devolution and management of real property and property held in trust, and many of the broader doctrines of equity were still in process of growth. Lord Nottingham, the father of modern equity, held the office of chancellor from 1673 to 1682, but was succeeded by several chancellors of inferior capacity who added nothing to the prestige of the court, while the masters and inferior officers were chiefly distinguished for rapacity and extortion, not to speak of incompetency and dishonesty, in the management of property committed to their care.¹ Reform came, but too late to convince the more democratic communities of the positive advantages of chancery procedure, while the prevailing fanatical devotion to

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¹ Parkes's History of the High Court of Chancery.

trial by jury operated as a check upon any system that seemed to interfere with that palladium of liberty.

It was manifestly impossible to administer complete justice according to the English system without the assertion of equitable rights and the enforcement of equitable remedies. Anything less would have amounted to a denial of justice, and in so far as some few equitable rights were concerned, this was vaguely recognized. But a true appreciation of the necessity for the introduction of chancery procedure was obscured by a common and popular error which confused equity with so-called natural justice; an error for which chancery literature was, perhaps, itself in a measure responsible, in basing its claims to override the strict rules of the common law upon the strength of an intrinsic ethical superiority.¹

Another obstacle to the introduction of equity jurisprudence was the primitive social conditions that prevailed in the sparsely populated settlements. There was sufficient difficulty in the conduct of an ordinary lawsuit in the local courts without adding to the embarrassment of the magistracy by requiring them to solve the mysteries of the unreformed chancery pleading and practice. The colonial judge of the seventeenth and eighteenth centuries was in knowledge and training about on a par with the English justice of the peace and it would have been as preposterous to expect the former to undertake the office of chancellor as to impose similar duties on the English quarter sessions. When, in the eighteenth century, trained lawyers began to make their influence felt in the colonies, disputes and misunderstandings between the assemblies and the governors prevented the creation of or retarded the growth of courts of chancery, resulting in a conflict of principles and practice in the several provinces far

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¹ Maine's Ancient Law, chapter 3.

too intricate to be briefly described.¹ The theory upheld by the crown lawyers, and put in practice in the more tractable colonies, was that the governor, as custodian of the great seal, was the proper person to act as chancellor, assisted if necessary by the council. To this the more democratic communities were opposed, as an undue extension of the prerogative, but they had no substitute to offer except the direct exercise of equitable relief by legislative resolution or the delegation of limited equity powers to the ordinary courts, such as giving relief from the penal clauses of bonds and mortgages. It did not seem difficult to the uninitiated to inject into the law such equitable principles as would mitigate the harshness of its stricter rules. The limited scope of such an experiment and the deprivation involved, in the elimination of the powerful preventive measures afforded by chancery process, became apparent only when the commercial and industrial expansion of the American commonwealths had brought about more complicated social relations.

The reform of procedure in the more progressive jurisdictions, has buried chancery and common law practice in a common tomb and if it were safe to hazard an opinion upon the parentage of the modern complaint, or statement, the inclination would be to favor the bill in equity rather than the common law declaration. But it would seem that before these momentous changes could well be brought about, it was necessary that both systems should reach the limits of their development, that there should be a thoroughly scientific demonstra-

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¹ Courts of Chancery in the American Colonies, S. D. Wilson, *American Law Review*, Vol. XVIII, 226, reprinted in *Select Essays in Anglo-American Legal History*, Vol. II, 779; Story's *Miscellaneous Writings*, 151. History of Equity in the American Colonies, E. B. Gager, in *Two Centuries' Growth of American Law*, chapter 6.

tion of the economic waste involved in a dual and highly artificial procedure, before one more simple and rational could be evolved. Conservative opinion hesitates to endorse these changes, and the tendency, displayed in many jurisdictions, to overload procedure with petty statutory details, that ought to be left to the rules of court, shows an immature conception of the principles of law reform. If this is true today, how poorly prepared was the eighteenth century for experiments in jurisprudence, with a bar nourished on technicalities and trained to state almost every legal right in procedural terms.

Pennsylvania was one of the most persistent of the colonies in its opposition to the introduction of a court of chancery, and its courts were the most fertile in devising expedients to decrease the inconveniences resulting from such opposition, and this, although in the immediately adjoining colonies chancery had a fairly successful development. In the early period, political conditions had much to do with the failure of the only serious attempt to establish such a court. After the Revolution, opposition to the extension of equity jurisdiction long continued as a political tradition, in spite of the changed attitude of the leaders of the bar.

While the territory on the Delaware was under the government of the Duke of York it would seem to have been the intention to administer equity, in the popular sense of that word, through the court of assizes. Among the laws of April 2, 1664, was one that provided:—

“In regard it is almost impossible to provide Sufficient Lawes in all Cases, or proper Punishments for all Crimes the Court of Sessions shall not take further Cognizance of any Case or Crimes, whereof there is not provition made in some Lawes but to remit the case or Crime, with the due Examination and proof to the Next Court of Assizes where matters of Equity shall be decided,

or punishment awarded according to the discretion of the Bench and not Contrary to the known Laws of England."¹

This was amended at the court of assizes held in September, 1665, as follows:—

"Where the Originall Point is matter of equity the proceedings shall bee by way of Bill and delivering in Answers upon Oath and by the Examination of witnesses, in like manner as is used in the Court of Chancery in England. And due regard must be had that the Defendant have timely notice thereof, as is appointed at Common Law; which is eight dayes warning before the Court shall sitt."²

In the following February it was ordained that "matters of Equity under five pounds may be tried in Town Courts and if under twenty at Sessions." This investing of the lower courts with equitable powers was undoubtedly intended to lessen the hardship of seeking relief in a distant court meeting but once a year, and its practical application was probably limited to giving effect to the more obvious equities of defendants. That such was the case, would appear from the instructions of Governor Andros to the justices of the court at New Castle dated August 14, 1677, in reply to a query on their part.

"As to penal Bonds or such like cases of Equity it is the custom & practice of Courts here, to hear & judge thereof according to Equity, wch you may also observe as Allowed by Law."³

At the court for Deal, afterwards Sussex, County held June 13 and 14, 1682, Henry Stracher obtained a verdict against Peter Groundyk in an "action of the case," the nature of which is not disclosed, whereupon—

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¹ Charter and Laws of Pennsylvania, 35.

² Charter and Laws of Pennsylvania, 61.

³ V Pennsylvania Archives (2d series), 697.

"Peter Groundlyk peticon the Court that he may have That was this day Tryd betwene Henry Stracher Ant this peticoner to be Tryd in Equiety, the next Court by bill and Answer as is use in the Court of Chancery in England which the Court would A perswaded him to A dissisted in it; and rest himselfe satisfied in what was allready done; but through his perswading the Court grant the peticoner his request; provided that the proceeding be put in in due time According to Law."¹

At the September court, however, nothing is recorded as to the "Tryal in Equiety" which the justices seem to have been reluctant to undertake.

There are also instances where the governor at New York assumed the equitable power of granting relief against oppressive judgments at law, of which the following order is an illustration:—

By the Governor

Whereas Hendrick Jansen Van Bremen, of Swanyck or Paerden Hook, near Newcastle in Delaware River, hath preferr'd a Petition unto me setting forth, that having heretofore, in the Time of the Dutch, received great Damage in his Corne, by Mr Wm Toms Horses, by Reason of his insufficient Fence; It was Ordered, that Mr Toms Land there, should be Sold in Vendue, which said Order being not effected, The Petitioner since the Restoration of the English Government, took the said Horses off his Land, and sent them to Mr Tom at New Castle, desiring they might be kept from his Corne; But the Petitioner still sustaining Damage, without Relief, he acknowledges that in Passion, he rashly and unadvisedly, shot one of the said Horses, with small shot, whereof he not long after dyed; Whereupon Mr Tom Sued the Peticoner in the Court of Newcastle, from the which Appealing to the High Court, Judgment past against the Peticoner there for Six Hundred Guildrs to be paid by him to Mr Tom, for his Horse, besides One Hundred Guildrs Charges; But was neither call'd, nor heard there; Wherefore I have thought fitt, & do hereby Order, that the said Hendrick Jansen giving Security, by binding over his Person and Estate, to makegood his Complaint, That Execucon be Suspended; And that all the

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¹ Sussex County Records (Turner), 76.

Proceedings, Papers, Writings, Passages or Proofs, both in Dutch and English Time, beforthwith Transmitted hither, for a final Determinacon in Equity.

Given under my Hand in New Yorke this 25th day of May 1676.

E; ANDROS.

To the Justices of the Peace of Newcastle in Deleware."¹

A petition for equitable relief preferred by Arnoldus la Grange to Governor Andros in connection with the litigation concerning the title to Tinicum Island will be found in the archives, but the action taken thereon by the governor is not recorded.²

With the further history of equity in New York we are not directly concerned. By an act passed soon after the separation from Pennsylvania a court of chancery was authorized but the law seems to have been disregarded.³ Lord Bellomont, the governor, writing to the lords of trade October 19, 1700, says: "There is a great want of a court of chancery here, but nobody here understanding it rightly I delay appointing one till the judge and attorney general's coming from England."⁴ The lords, in reply, directed him to establish the court at once and in the following year the court was proclaimed by ordinance of his successor, Lieutenant Governor Nanfan. Nothing, however, of importance seems to have been done and it would appear that some of the governors disliked the responsibility. Lord Cornbury, who was also appointed royal governor of New Jersey, wrote to the lords of trade on May 7, 1711:—

¹ V Pennsylvania Archives (2d series), 679.

² VII Pennsylvania Archives (2d series), 799.

³ Broadhead's History of New York, Vol. II, 385, gives the date of the act as November 1, 1683. It appears in the laws of 1694 as of 1691. Compare preface to 1 Johnson's Chancery Reports (N. Y.).

⁴ New York Colonial Documents, Vol. IV, 882.

"In both plantations I have been pelted with petitions for a Court of Chancery; and I have been made acquainted with some cases which very much require such a court, there being no relief at common law, I had ordered the committee of both Councils to form a scheme for such a court, but to no purpose; the trust of the seals they say constitute a chancellor, and unless the Governor can part with the seals there can be no chancellor but himself. I have already more business than I can attend to, besides I am very ignorant in matters, having never in my life been concerned in any one suit. So I earnestly beg your lordship's directions as to that Court."¹

The court was also a favorite object of attack by the popular party. Governor Hunter on January 1, 1712, wrote:—

"The country here, in general, groaned for a Court of Chancery which had been discontinued for some time before my arrival in these parts. * * * I gave a public notification of that court being opened, and the House of Representatives, in their angry mood resolved that the erecting of such a court without their consent was against law."²

In spite of this and similar attacks the court maintained its existence until reorganized after the Revolution and adoption of the constitution of 1777, but the amount of business transacted was comparatively small until the time of Chancellors Livingston and Kent.

In Pennsylvania and Delaware, as we have seen, Penn took over the local courts very much as he found them, exercising a supervisory jurisdiction through the provincial council. On the hearing of appeals before the latter body equitable principles were applied as is illustrated by the case of *Bellamy v. Watson*, described in the court below as "an action of Trasspase and ejectment" for land on Prime Hook. The case was tried at Lewes on May 27, 1683, before a jury who found a ver-

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¹ IV New Jersey Archives, 70.

² New York Colonial Documents, Vol. V, 298.

dict for the defendant.¹ The plaintiff appealed to the governor and council who heard the case in July and were unanimously of the opinion that one Smith, under whom the defendant claimed, had no title in law or equity. They entered judgment for the plaintiff, he to pay the defendant for his improvements, the value of which was to be fixed by appraisers, and gave the defendant four months' time in which to remove his crops, stock and "other moveable concernes."² A year later it is recorded that the difference between Watson and Bellamy was amicably settled by mutual conveyances, "and thus they agreed & shaked hands."³ In another case that came before the council, that body seems to have been in doubt whether they ought to proceed in law or equity, but the nature of the business is not given.⁴

By the Act of May 10, 1684, passed at New Castle, it was provided that the "Quarter Sessions be as well a court of Equity as Law, Concerning any Judgment given in Cases by Law capable of Triall in the respective County Sessions and Courts,"⁵ and by another chapter of the same act a provincial court was constituted, the judges of which were given cognizance of appeals and all causes both in law and equity not determinable by the county courts. This enactment seems to have caused some misgivings for in 1685 the council "Ordered that a bill be drawn up That y^e Word Equity be left out in ye Law off County Courts."⁶ The conception of equity then entertained is illustrated by the following case taken from the minutes of the court of common pleas of

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¹ Sussex County Records (Turner), 97.

² I Colonial Records, 21, 4, 5 mo. 1683.

³ I Colonial Records, 65, 14, 6 mo. 1684.

⁴ I Colonial Records, 63, 20 4 mo. 1684.

⁵ Charter and Laws of Pennsylvania, 167.

⁶ I Colonial Records, 75, 3, 2 mo. 1685.

Chester County, where the court sitting in equity, modified its own judgment previously entered at law.

"*Josua Hastings v. Francis Yarnall*. The Declaration was read—the answer was read. Judgment for plaintiff 25 shillings with costs of suit. Upon which the defendant makes his appeal to the next court of equity for this county.

1686 at a court of equity
held at Chester ye 5th day
of the 1st week of ye 10th
month, 1686

} Commissioners present, John
Bluston, Samuel Lewis, John
Simcocke, Robert Wade, Geo.
Maris, Robert Pile, Bartholo-
mew Coppoche, Robert Eyre
Clech.

Francis Yarnall of this county preferred a bill to this court wherein he required a remedy against ye verdict of Jury and Judgment of court obtained against him by Joshua Hastings of ye same county, at the last court of Common Pleas held for this county, at Chester, the 3rd and 4th days of this present weeke. Upon which it was decreed that Francis Yarnall should pay 10 shillings and bear half the charges of that court."¹

Such proceedings gave offense to the people, as unduly interfering with the verdicts of juries, and in 1687 the assembly asked for a conference with the council upon certain questions, among them "how far y^e County Quarter Sessions may be Judges of Equity as well as Law and if after a judgment in Law whether the same Court hath power to Resolve itselfe into a Court of Equity, and Either Mitigate, alter, or Revers y^e said Judgment."² The council answered evasively that the law made at New Castle "doth supply and answer all occasions of appeal, and is a plainer rule to proceed by."³

By the Act of May 10, 1690, it was provided that the county courts "shall be Courts of equitie for the hearing

¹ Chester County Records, 3, 10 mo. 1686, quoted by Peter McCall in his address before the Law Academy, 21.

² I Colonial Records, 159, 12, 3 mo. 1687.

³ I Votes of the Assembly, 41.

and determining all matters and causes cognizable in the said Court, under the value of ten pounds," and that the provincial court should have the hearing and determining of all appeals from the county courts both in law and equity.¹ This statute was substantially re-enacted in 1693 during the administration of Governor Fletcher of New York.² During all this time there were frequent petitions to the council, for relief against judgments of the courts, several of which were relegated to the county or provincial courts for a hearing in equity.³

The relief given under the name of equity would seem to have been similar to the discretionary powers of the courts now exercised on rules to open judgments, or in controlling verdicts on motions for new trials, and there is no trace of formal chancery proceedings. Nevertheless the popular dislike of any interference with verdicts is voiced in a further complaint of the assembly, in 1694, stating that the judges had too great liberty to destroy or make void the verdicts of juries and praying that they might be instructed not to decree anything in equity to the prejudice of judgments before given in law.⁴ Even more vigorous would have been their remonstrance if there had been an attempt to introduce real chancery pleading, but this was foreign to the spirit of Penn's legislation, which permitted "all persons to freely appear in their own way and personally plead their own cases themselves, or if unable, by their friends."⁵

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¹ Charter and Laws of Pennsylvania, 184. The assembly tried to strike out the word equity, I Votes of the Assembly, 57.

² Charter and Laws of Pennsylvania, 214, 225. See also Act of November 27, 1700, II Statutes at Large, 134.

³ I Colonial Records, 161, 18, 3 mo. 1687; I Colonial Records 441, April 24, 1695; I Colonial Records, 442, May 25, 1695; I Colonial Records, 478, May 24, 1697.

⁴ I Votes of the Assembly, 79.

⁵ Charter and Laws of Pennsylvania, 100, re-enacted November 27, 1700; II Statutes at Large, 128.

The prolonged controversy between the assembly, the governors and the home government over the court laws that took place in the early years of the eighteenth century has been sufficiently discussed and will be referred to here only in so far as it affected equity jurisdiction. The Act of October 28, 1701,¹ believed to have been drafted by David Lloyd, contained this provision:—

“That the said justices in the respective county courts shall have full power, and are hereby empowered and authorized to hear and decree all such matters and causes of equity as shall come before them in the said courts, wherein the proceedings shall be by bill and answer, with such other pleadings as are necessary in chancery courts and proper in these parts, with power also for the said justices to force obedience to their decrees in equity, by imprisonment or sequestration of lands, as the case may require.”

An appeal was given to the provincial court, which was empowered to revoke, alter and confirm decrees according to equity and justice.

This act, which was repealed by the queen in council on February 7, 1705, because the lords commissioners for trade conceived that so far from expediting the determination of lawsuits it would impede the same,² attempted to introduce a more elaborate procedure without actually committing the courts to the English practice, and, like all half measures, would have led to confusion and litigation. One can imagine the unlearned judges of the county courts deciding how much chancery pleading was “proper in these parts.” There is no trace of any proceedings had under its authority; in fact Chief Justice Guest in 1703 made a complaint to the council—

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¹ II Statutes at Large, 148. See Charter and Laws of Pennsylvania, 300.

² II Statutes at Large, 481.

"That notwithstanding ye Laws of this Govmt had erected Courts of Equity & ye Justices, have a power also in their Commission for ye same: Yet that to ye great oppression of ye People, there have been no such courts as yet held in pursuance of ye present Law, the Rules of ye said Court not having yet recevd so full a sanction as tis thought may be requisite."¹

It was ordered that the rules should be produced at the next session of the council, but nothing further appears to have been done until September, 1704, when Guest moved that the rules agreed on by the county court should be enforced in all the courts.² Finally in the following April the rules prepared by "certain persons skilled in the law" were laid before the council and approved,³ but not long afterwards the governor was notified of the repeal of the act.

The controversy that followed between the governor and council on the one side and the speaker and assembly on the other was the first real crisis in the history of equity in Pennsylvania. Lasting as it did for three sessions of the legislature we can gather some information as to the respective plans submitted for the organization of the courts, although the text of the bills has not come down to us. Chancery was the chief bone of contention. Governor Evans wished to act as chancellor assisted by the council, in accordance with the practice recently established in the crown colonies, and it would seem that the assembly was at first inclined to yield this point "provided that the court meddle not with matters wherein sufficient remedy may be had in any other court"⁴ whether by the rules of the common law or the laws of the province. But the country members were afraid that too much of the business of the courts

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¹ II Colonial Records, 115, 29, 11 mo. 1703-4.

² II Colonial Records, 164, 15, 7 mo. 1704.

³ II Colonial Records, 189, 13, 2 mo. 1704-5.

⁴ II Colonial Records, 263, 23, 7 mo. 1706.

would be drawn to Philadelphia, and after some fruitless discussion the house was dismissed and the matter postponed until the meeting of the new assembly. This assembly was even more completely dominated by David Lloyd, the speaker, than its predecessor and replied to the bill of the governor, drawn up by the "practitioners of the law," with a "long and tedious bill"¹ of its own which appears to have been a modified form of David Lloyd's act of 1701 that had been rejected by the Crown. The governor at once objected to the administration of equity by county justices who had previously decided the same question at law, to which the assembly replied that the council should devote their attention to public affairs and leave private causes to the justices—

"That the Court of Equity as proposed by the Bill, gives no Colour of authority for the same persons to Judge twice of the same cause, for that matters of Equity being originally begun there, and a Clause particularly obliging them not to intermeddle with matters of Law in the said Courts of Equity, and our Bill being warranted in that point by an act of Parliamt which gives the Judges of the Common Law Power to determine matters of Equity in the same Sessions throughout the Dominion of Wales, We find no cause to Recede from what we have already proposed."²

To this the council quickly replied that it was wiser to follow the practice of the "others of the Queen's colonies" than to draw from the court of the "Marches of Wales, which for its inconveniency, 'tis said has been abrogated by act of Parliament."³

This aroused the ire of the Welsh Speaker and back came the hot reply that whoever had advised that any

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¹ II Colonial Records, 266, 25, 7 mo. 1706.

² II Colonial Records, 280, 27, 9 mo. 1706.

³ II Colonial Records, 282, November 28, 1706.

part of the law which established courts in Wales was abrogated gave pernicious counsel to the governor. Only that portion of the ordinance of Wales which gave the president and council chancery powers had been suppressed, but the settlement of chancery in the respective counties of Wales, the foundation of the assembly's bill had "had constant allowance since the time of King Henry ye Sth."¹

The governor rejoined that "if there were any mistake in a matter that is so foreign to us as the Courts of Wales, it might have been hinted to the Gov^r in another language than calling it pernicious council," and again urged that the court of chancery be settled as in other parts of the queen's dominions.² The assembly remained firm and were in a fair way to win this point, but the discussion of other features of the bill became so acrimonious that finally the house adjourned without passing any court law and the governor established the courts by an ordinance which, incidentally, conferred equity powers upon the county courts of common pleas and the supreme provincial court.³ The assembly vigorously protested that the ordinance was illegal but no compromise could be effected and the courts continued to sit by authority of the ordinance during the remainder of Evans's administration.

So far as equity was concerned, the anti-proprietary party had achieved a distinct success and it is not a little curious that this was, at least in part, due to the fact that their leader, a Welsh lawyer, could cite the courts of his native principality as a precedent for what he offered for adoption in Pennsylvania. Although the

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¹ II Colonial Records, 288, 2, 10 mo. 1706.

² II Colonial Records, 295, 23, 10 mo. 1706.

³ Charter and Laws of Pennsylvania, 319. The remonstrance of the Assembly will be found in II Colonial Records, 362. March 4, 1706-7.

subject is inadequately treated by text writers it would seem that David Lloyd's assertions were correct; that the court of the lord president and the council in the principality of Wales and the Marches had jurisdiction in cases of equity by force of the king's commission and instructions;¹ that this court was abolished in 1689,² and that equity jurisdiction was exercised thereafter by the court of great sessions, the principal law court of Wales, which was not visited by the English judges of assize.³ The procedure on the equity side of this court was by bill, answer and demurrer in accordance with ordinary chancery practice, although somewhat more dilatory than in the high court of chancery, owing to the long intervals between circuit and circuit.⁴ The jurisdiction of this court was, however, not exclusive either at law or in equity.⁵

It is unfortunate that the early records of our courts have not been preserved in such a condition as to afford much information regarding the extent that equity was administered under this system, if at all. In 1710 an "act for establishing courts of judicature" was passed,

¹ IV Coke's Institutes, 242; Pembrokeshire by Owen of Heullys (1603), Folio 74a, edition of 1892, page 155; History of Radnorshire by Rev. Jonathan Williams, 72; Archæologia Cambrensis, Vol. III (series 3), 29; Bacon's Law Tracts, Jurisdiction of the Marches.

² I William and Mary, chapter 27.

³ The court of great sessions was abolished by the act of I William IV, chapter 70; Stephen's Commentaries on the Law of England (1st edition), Introduction, § 4.

⁴ Abbot's Jurisdiction and Practice of the Court of Great Sessions of Wales (1795), 94 and introduction, xxviii.

⁵ Viner's Abridgment, title, Wales, D., *Morgan v. —*, I Atkins' Reports, 408 (1737); *Griffith v. Joanes*, Choyce Cases in Chancery, 129 (1578); Prohibitions might issue from the King's Bench directed to the Court of Great Sessions, *Vaughn v. Evans*, 8 Modern Reports, 374 (1725), *Trantor v. Duggan*, 12 Modern Reports, 138 (1698).

which conferred appellate equity jurisdiction on the supreme court, and original equity jurisdiction on the county courts of common pleas with a proviso that—

“When matters of fact shall happen to arise upon their examination, or hearing of the matters and causes to be heard and determined in the said court, then and in every such case, they shall order the matter of fact to issue and trial at the court of common pleas, for the proper county, where the fact ariseth, before they proceed to sentence or decree in the said court of equity.”¹

This clause was largely responsible for the repeal of the act by the queen in council, Lord Raymond, the solicitor general, having given an opinion that it would “make proceedings in equity insufferably dilatory and multiply trials at law in the plain cases to no manner of purpose.”² Upon notification of the repeal Governor Gookin revived the courts by an ordinance drafted by Robert Assheton which contained the substance of the repealed act in a more concise form.³ When the assembly took into consideration the reenactment of the court laws it was decided that separate laws should be passed for each of the courts and further resolved “that all matters of Equity, shall begin originally in the Provincial Court with Power to grant Injunctions and to have general jurisdiction over the Province.”⁴ What brought about this change of opinion on the part of David Lloyd, who was again speaker and principal draftsman of the acts passed in accordance with the

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¹ February 28, 1710–11, II Statutes at Large, 301; Charter and Laws of Pennsylvania, 323.

² II Statutes at Large, 549, 1 Pennsylvania Archives (1st Series), 157.

³ II Statutes at Large, 556; Charter and Laws of Pennsylvania, 351; The Assembly, as usual, protested against this ordinance, II Colonial Records, 599, August 4, 1714.

⁴ II Votes of the Assembly, 161, 20, 11 mo. 1714–15.

resolution on May 28, 1715,¹ must be left to conjecture. Experience had perhaps taught him by this time that the county courts were incapable of administering formal equity. At any rate the county courts of common pleas ceased to exercise chancery powers and the perpetuation of the Welsh system was left to depend on the supreme provincial court, which received the following chancery powers:—

“Section III. And be it further enacted by the authority aforesaid, That the said judges of the supreme court are hereby also authorized and enabled to hold plea in equity, by bill, appeal, petition or suit, to be brought or exhibited in the said court by, for or against any person or persons whatsoever, for any discovery, or other matters relievable in equity; and thereupon to issue out process of subpoena or *distringas*, and all other usual process for compelling the parties defendants in such suits to appear, put in their answers and make their defenses to such bills, appeals, petitions (or) suits; and for the parties to proceed therein and thereupon according to such rules or orders, and in such manner and form as the courts of chancery and exchequer in Great Britain have used to proceed by.

“And upon issues joined in any of the said causes or suits in equity, the said court is to cause witnesses to be examined if desired, on either side, by commissions to be awarded for that purpose, or by sworn or attested examiners; and after the publication of the depositions of the witnesses, to proceed to the hearing of the said causes, and upon proofs and evidences therein or thereupon, or upon bill and answer, where no witnesses shall be examined, or proofs made, to make such orders and decrees either for the r(elief of) the plaintiffs or for the directing any issue or issues at law to be (tried) for the information of the court, or for the dismissing of the said plaintiff's bills or otherwise, as the said court shall see just and reasonable, and as is or hath been used in the said courts of chancery or exchequer in Great Britain.

“And the said court shall award such process for the enforcing the parties, in the said suits, to yield obedience to such orders or decrees as shall be made in the said causes, and in case of non-performance thereof, or disobedience thereto, the said

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¹ III Statutes at Large, 65.

court shall award all such process of contempt against the persons and estates of him or them that shall be in contempt or refuse obedience to any of the said orders or decrees, and make and execute like process, orders and proceedings thereupon, as are and hath been used in like cases in or by the said courts of chancery or exchequer in Great Britain; and that the prothonotary of the supreme court shall be register of the said court of equity."

Unfortunately, the Act of 1715 received scant consideration from the lords commissioners of trade and was repealed by the king in council on July 21, 1719.¹

The notification of the repeal of this law was received at a time when good feeling prevailed in the province. David Lloyd had been appointed chief justice and had ceased to be a disturbing factor, Andrew Hamilton, the bar leader of his time, was attorney general, while Sir William Keith, the governor, was at the height of his popularity. On May 3, 1720, the governor addressed a message to the assembly in which he stated that, having consulted gentlemen learned in the law, he was satisfied "that no representative body, in any of his Majesty's colonies, is invested with the power to erect such a court, or that the office of chancellor can be lawfully executed by any person whatsoever, except him, who, by virtue of the great seal of England, may be understood to act as the King's representative in the place." On the following day the message was considered by the assembly and it was resolved, "that, considering the present circumstances of this Province, this House is of opinion, that, for the present, the Governor be desired to open and hold a court of equity for this Province, with the assistance of such of his council as he shall think fit, except such as have heard the same cause in any inferior court."²

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¹ III Statutes at Large, 439, 464.

² Charter and Laws of Pennsylvania, 305; II Votes of the Assembly, 271; III Colonial Records, 84, June 8, 1720.

At a meeting of the council on August 6, 1720, the governor brought the matter to the attention of the members who resolved:—

“That it is the Opinion of this Board, that by virtue of the Powers granted by the Royal Charter to the late Proprietor, his Heirs and Assigns, and to his and their Lieutents. or Deputies, being regularly appointed, the present Governour William Keith, Esqr., safely may comply with the Desire of the Representatives of the ffreemen of this Province, signified to him by an unanimous Resolution of their House, dated at Philadelphia the 4th day of May last, And that the holding of such a Court of Chancery in the manner aforesaid, may be of great Service to the Inhabitants of this Colony, and appears agreeable to the practice which has been approved of in the neighbouring Governments.

“But the Governour speaking to his own want of Experience in Judicial Affairs, and representing to the Board the great Addition of Attendance and Fatigue in the public Business which would be thereby laid upon him, He was pleased to add nevertheless, that considering the many marks the House of Representatives and this Board had shewn of their Confidence in him in this as well as divers other respects, He should not decline to serve the Publick in that Station, but insisted on this, that as no Court of Chancery could by the method proposed be held without him, So that He, on the other hand, should not fail of having a due assistance from the Council on their parts; And it was thereupon, at the Governours desire, established and declared.

“That as often as the Governour is to sit in Chancery and hold a Court, All the members of Council in or near Philadelphia, shall be summoned to attend the Governour as his assistants upon that Bench, and that there shall not any Decree be pronounced or made in Chancery but by the Governour as Chancellor, with the assent and concurrence of any two or more of the Six eldest of the Council for the time being, And that those Six eldest Counsellors or assistants, or any of them, may be employed by the Governour as Masters in Chancery, as often as Occasion shall require.

“And that the Inhabitants may have due notice of the said Court, it is ordered that A Proclamation be issued certifying all his Majestys Liege People of this Province, that for the more equal Distribution of Justice and the Conveniency of the

Subject, a Court of Equity or Chancery will be opened by the Governour, at the Court House in Philadelphia, upon the 25th day of this instant, August, in order to hear and judge of all such matters within this province, as are regularly cognizable before any Court of Chancery, according to the Laws and Constitutions of that part of Great Britain called England, and that the said Court will be always open for the Relief of the Subject; Whereof his Majestys Judges of the Supreme Court, and the Justices of the inferiour Courts, and all others whom it may concern are to take Notice, and to govern themselves accordingly."¹

Four days later the following proclamation was made:—

“COURT OF CHANCERY.

“By William Keith Esqr. Govern^r Of the Province of Pennsylvania & Counties of New Castle, Kent & Sussex, upon Delaware. A. Proclamation.

“Whereas Complaint has been made, That Courts of Chancery or Equity are absolutely necessary in the Administration of Justice, for mitigating in many cases the Rigour of ye Laws, whose Judgments are tied down to fixed and unalterable Rules, and for Opening away to the Right and Equity Of a Cause for which the Law cannot in all cases make a Sufficient Provision. Have notwithstanding been but too seldom regularly held in this Province, in such a manner as ye aggrieved Subject might obtain the Reliefe which by such Courts ought to be Granted. And Where as, the Representatives of ye Freemen of this Province taking ye same into Consideration, did at their last meeting in Assembly request me that I would with ye assistance of ye Council, Open and hold such a Court of Equity for this Province, To ye end therefore that his Majesties good Subjects may no longer Labour under these inconveniences which are now Complaind Of, I have thought fitt, by and with the advice of the Council, hereby to Publish and Declare, That with their assistance I Purpose (God willing) to open and hold a Court of Chancery or Equity, for this Province of Pensilvania, at ye Court House of Philadelphia, on Thursday the Twenty fifth day of this instant August, From which Date the Said Court will be and remain Always Open for the Reliefe of ye Subject, to hear and Determine all such matters arrising within the Province

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¹ III Colonial Records, 100, August 6, 1720.

aforesd, as are regularly Cognizable before any Court of Chancery, According to ye Laws and Constitution of that part of Great Britain called England. And his Majesties Judges of his Supream Court, as well as ye Justices of the Inferior Courts, and all others whom it may Concern, are required to take Notice hereof, and to govern themselves Accordingly. Given at Philadelphia, ye tenth day of August, in the Seventh year of the Reign of our Sovereign Lord George King of Great Britain, France & Ireland, Defender of the Faith &c. Annoq. Domini 1720.

"God Save the King.

"W. Keith."¹

A few days later the assembly took into consideration the governor's proclamation and on the twenty-eighth of August extended to him their thanks for his message and requested that he should choose as his assistants those who had not heard the cases before in the inferior courts, to which the governor readily assented and in this auspicious manner was established the first and only separate court of chancery in Pennsylvania. When the common law courts were once more established by the Act of May 22, 1722,² no equity jurisdiction was conferred upon either the supreme or county courts.

On the twenty-fifth of August, 1720, Sir William Keith qualified as chancellor and appointed Charles Brockden registrar. James Logan and five other members of the council were named as masters and from time to time thereafter other appointments both of masters and examiners were made. The proceedings of the court, long buried in oblivion, are not referred to in the reported cases, and the only allusion to them by an early historian is a statement by Proud that John Kinsey, afterwards chief justice, was compelled by Sir William to take off his hat when addressing the court, an act

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¹ Charter and Laws of Pennsylvania, 386, II Votes of the Assembly, 274.

² II Statutes at Large, 298.

which brought upon the governor a remonstrance by the quarterly meeting of Friends.¹ Thanks to the perseverance of William Henry Rawle, Esq., a portion of the records of the court were found in a folio volume that had lain neglected for many years among the unpublished archives of the state department and which proved to be the registrar's book. A critical examination of the cases contained in the register will be found in Mr. Rawle's admirable address on Equity in Pennsylvania, delivered before the Law Academy of Philadelphia in 1868.² Among the cases in which the court of chancery exercised jurisdiction were bills for account and for partition; to subject land to the payment of debts and legacies; to stay waste; to restrain proceedings at law; to take the testimony of witnesses in foreign parts; to settle differences between partners; petitions for writs *de lunatico inquirendo*, and for writs *ne exeat provincia*.³ The frequent use of the last named writ is interesting. Confined in its original application to cases involving the safety of the realm, its use had, in time, extended to private causes as a means of procuring equitable bail. The departure of a litigant out of the jurisdiction of the court without security for his appearance was a serious matter indeed in days when communication between Europe and America was slow and difficult.

The case of *Cole v. Wathell*⁴ is curious, as an application to chancery in an admiralty cause. The complainants, part owners of a ship, filed a petition setting forth that the defendant, also a part owner, had refused to join with them in fitting out and loading the vessel for a proposed voyage, that she was about to sail for the

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¹ Proud's History of Pennsylvania, Vol. II, 200.

² The lecture was published by the Law Academy of Philadelphia in 1868 with the register as an appendix.

³ Rawle's Equity in Pennsylvania, 26.

⁴ Rawle's Equity in Pennsylvania, 38, appendix 23 (1728).

Barbadoes and there being no person in this government acting as judge of vice-admiralty, they were obliged to apply to the governor, as chancellor, for equitable relief and praying that, "according to the custom and usage in such cases," the chancellor would appoint appraisers, to value the defendant's interest, they being willing to account to him for the appraised value. The defendant was given time to dispose of his interest or join in fitting out the ship, but he left town without leaving any notice of what he had done or intended to do, whereupon an order was made appointing three appraisers, who filed a return valuing the defendant's interest at "two hundred and forty pounds current money of Pennsylvania." In *Blad v. Bamfield*,¹ Lord Nottingham said: "I took this occasion to show that the court of chancery hath always had an admiral jurisdiction, not only *per viam appellationis*, but *per viam evocationis* too, and may send for any cause out of the admiralty to determine it here." On several other occasions the lord chancellor asserted and enforced this concurrent jurisdiction, which extended at least to cases of depredations on the sea, and has long been deemed obsolete, so that it is quite possible, although by no means certain, that a knowledge of these seventeenth century precedents may have induced the complainants in *Cole v. Wathell* to seek relief in chancery.

From the minutes in the register it would appear that the cases did not proceed with much rapidity, in fact many of them were before the court for several years, delayed by all sorts of dilatory motions. In a partition case² one of the defendants was particularly obstinate.

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¹ 3 Swanston's Reports, 604 (1674); *Blad's Case*, 3 Swanston's Reports, 603 (1673); *Denew v. Stock*, 3 Swanston's Reports, 662 (1677); *Rex v. Carew*, 3 Swanston's Reports, 699 (1682); Spence's Equity, Vol. I, 703.

² *Ellis v. Ellis*, Rawle's Equity in Pennsylvania, appendix, 34.

Having refused to appear in response to a subpoena and *alias* subpoena, he was attached and remained in jail from June, 1733, to November, 1734, when counsel for complainants moved that the bill be taken *pro confesso* against him. He was then set at liberty and ordered to prepare an answer within a month, which he declined to do, whereupon the court proceeded to a hearing and entered a decree for partition and mutual conveyances. This he declined to obey and in the archives will be found the proof of service of notice on him, with his answer that "he had been informed that there was a decree against him but that he did not care."¹ A writ of partition then issued, the nature of which is not explained.

The counsel practicing most frequently in the court were Andrew Hamilton, Joseph Growdon, John Kinsey and Peter Evans. Of the cases recorded only two were decided by Sir William Keith, who was removed by the proprietors from the office of governor in 1726 after a quarrel with Logan. His successor, Patrick Gordon, upon being applied to by the parties to proceed with several cases before the court, hesitated to act until he had consulted with the council as to his authority. The matter was debated and the governor assured that he might legally assume the duties of the office, whereupon he took the oath as chancellor.² It was further proposed that rules should be drawn up for the better regulation of the court and the speedier dispatch of business, and David Lloyd, the chief justice, and Andrew Hamilton were named for that purpose.

So far as can be discovered the practice in the court followed that of England. Suit was commenced by bill; a *subpœna ad respondendum* then issued; an answer

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¹ I Pennsylvania Archives (1st Series), 442.

² III Colonial Records, 281, February 2, 1726-7.

or demurrer was filed by the respondents; testimony was taken before examiners, or the matter referred to one of the masters; injunctions were issued and decrees enforced by attachment. On the whole, considering the number of years the court was in existence, the amount of business brought before it was small. Undoubtedly the tedious and technical character of the proceedings, their expense and the fact that the sittings of the court were dependent upon the convenience of the governor, tended to discourage litigants from seeking legal redress through such a channel.

In 1736 the silent dislike with which the court was regarded changed into open hostility. Perhaps the contagion, if it may be so described, spread from New York, where, in 1735, the general assembly had resolved that the court of chancery held by the governor without their consent was "contrary to law, unwarrantable, and of dangerous consequence to the liberties and properties of the people."¹ Petitions were presented, signed by inhabitants of Philadelphia, Bucks and Chester counties, complaining to the assembly that the holding of a court of chancery before the governor and council was contrary to a clause in Penn's charter of privileges which provided—

"That no person or persons shall or may, at any time hereafter, be obliged to answer any Complaint, matter or thing Whatsoever Relating to Property before the Govern^r and Council, or in any other place but in the ordinary Courts of Justice, unless appeals thereunto shall be hereafter by Law appointed."²

Even before the meeting of the assembly the subject had been taken up by the press and a spirited controversy had been carried on by contributors to the *Mercury*

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¹ Smith's History of New York, Vol. II, 24.

² II Colonial Records, 56, 28, 8 mo. 1701.

and the *Gazette*.¹ The assembly sent a message to the governor requesting information as to how the court of chancery was constituted,² and on March 27, 1736, resolved, "That the court of chancery as it is at present established is contrary to the charter of privileges granted to the freemen of this province."³ It was then resolved that the justices of the county courts be given power to determine all suits in equity under one hundred pounds, that a supreme court of equity should also be established, to which appeals might be taken from the inferior courts and which should also have original jurisdiction in all matters of equity "*prima instantia*" when the value of the claim exceeded one hundred pounds. The judges of this court were to consist of three persons, to be commissioned by the governor out of any six that should be nominated by the house. A bill was framed to this effect.⁴

The charge that he was violating the charter angered Governor Gordon and it was ordered that a vindication of the proceedings of the governor and council be prepared and published. Accordingly a voluminous report was drawn up by James Logan, giving a history of the establishment of the court, which, he said, was erected at the request of the assembly upon the best legal advice that could be procured, "particularly that of our then Attorney General, Andrew Hamilton, Esq., who was

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¹ See particularly the *Pennsylvania Mercury*, December 18, 1735, and the *Pennsylvania Gazette*, December 24, 1735. Thomas Penn wrote to John Penn on January 14, 1735: "The late newspapers have been filled with arguments for and against the legality of the Court of Chancery and some people whisper that we intend to make use of that court to recover our arrears." VII *Pennsylvania Archives* (2d Series), 166.

² III *Colonial Records*, 670, January 23, 1735-6.

³ III *Votes of the Assembly*, 253.

⁴ III *Votes of the Assembly*, 258-261.

esteemed and allowed to be as able in that Profession as any on the Continent of America,"—a fling at Hamilton, who as speaker of the assembly was now leading the opposition to the court. The report went on to argue that the word "property" as used in the charter had reference to the proprietary grants and that a court of chancery was an "ordinary court of justice." It concluded—

"The Assembly however may be assured, that none of the Council are fond, or in the least desirous, of the Employment, and if the Governor shews any Inclination the Court should be continued on the same Foot, we are perswaded it can be from no other Inducement than his Desire to preserve Decency and Order, and some Resemblance between this Government and all the other British Ones in America."¹

The assembly replied that they intended no offense to the governor or his council and were surprised at their resentment; that a vote of the house was not sufficient to raise a court nor was the opinion of one or more lawyers, who were left to answer for themselves, or the silence of subsequent assemblies of any consideration in the case; that they were sorry to see gentlemen of such penetration as the members of the council resigning away the common sense of the charter; that great men and even courts were often mistaken as to their own jurisdiction; that it had been decided in England that a court of equity could not be established except by act of parliament, and if the king could not raise such a court how could the deputy of the king's patentee do so? They further hoped to be pardoned for saying that, in their opinion it would have been more reasonable if notice had been taken of their resolution in time to save them the trouble of preparing the bill relating to courts of equity, which had long lain before the governor un-

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¹ IV Colonial Records, 27, February 16, 1735-6.

approved although the session of the assembly was drawing to a close.¹

Here the controversy was dropped, the assembly soon after adjourned and the governor continued to act as chancellor until his death in the following summer. The matter seems to have disturbed the proprietary party, for a case was stated presenting all the facts and the opinions taken of the Solicitor General, Sir Dudley Ryder, and the Attorney General, Sir John Willes, upon the legality of the court. They held, in effect, that the king had power, in erecting a new form of government in Pennsylvania, to authorize Penn to erect courts of equity and that the consent of the legislature was not necessary until Penn had made it so by the charter of 1701; that the unanimous resolution of 1720 was a sufficient declaration of the assent of the legislature to the erection of the court, and that the court could be lawfully held until the whole legislature passed an act to the contrary.² Nevertheless, Logan, who as president of the council administered the government for two years, probably felt that the office of chancellor was outside of the scope of his temporary duties and when Thomas was appointed lieutenant governor, in 1738, the court was not revived. The proprietors were unwilling to give up the court and refer to the matter several times in their correspondence. "We desire," wrote Thomas Penn to Mr. Peters, September 28, 1751, "that the court of chancery may be established in a manner most favorable to the people, without giving up the king's prerogative with which we are entrusted, we should have some share of influence, else the trial would not be equal. We are willing, however, that the assem-

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¹ IV Colonial Records, 41, February 21, 1735-6. The case cited to support their view is *Stephney v. Lloyd*, Croke's Reports (Elizabeth), 647 (1598).

² Appendix to Wharton's Edition of 1 Dallas's Reports, 514.

bly should regulate the court."¹ Nevertheless the assembly continued its opposition until the end of the proprietary government.

Thus, in the words of Horace Binney, Pennsylvania lost this system of justice because "her governors and representatives could not agree by whom the office of chancellor should be held."² The same dispute occurred in the other colonies and was settled according to the exigencies of local politics. There is no indication, however, of any real dislike on the part of the people to the principles of equity; in fact the petition from Bucks County against the governor's court distinctly demanded that some provision be made for such as want relief in equity, by the erection of courts of equity "more convenient for their attendance and less expensive to those who may have business there." While that from Chester County requested—

"That some Provision suitable to the Circumstances of the people may be made for such as want Relief in Equity, without being obliged to travel from the remotest parts of the Province to Philadelphia, & there to attend that Court at a very great & heavy Expence, Which Proceedings, as the Business of that Court does Increase, will undoubtedly become a very great Grievance to the People."³

It has been suggested that the opposition to the court of chancery would not have taken concrete form but for the influence of Andrew Hamilton who had recently been one of the defendants in an important equity suit brought in the high court of chancery of England where a decree had been entered against him.⁴ But this is

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¹ Penn MSS. quoted in Shepherd's Proprietary Government in Pennsylvania, 395.

² Eulogy on Chief Justice Tilghman, 16 Sergeant & Rawle's Reports, 448.

³ IV Colonial Records, 37, February 19, 1735-6.

⁴ III Statutes at Large, 472; VIII Pennsylvania Archives (2d Series), 69.

hardly probable. Hamilton was a man of wealth and influence enjoying a large practice, with a reputation for political independence; he had represented the proprietors in their controversy with Lord Baltimore and had defended the printer, Peter Zenger, in his famous trial at New York, and his activity was probably due to a desire to see the court put on a sound and popular basis. It is fascinating to read into history the characters of the chief actors, and particularly tempting when, as here, the strong personalities of such men as David Lloyd and Andrew Hamilton are found asserting themselves at the critical periods for equity in Pennsylvania. But too much may easily be made of this side of the story; the inhabitants were jealous of the power of the proprietors, they distrusted the governors and suspected the purposes of the Crown, they wanted cheap justice and demanded that it be brought to their doors, the very name "chancery" was odious and they would have none of it, while the governors and councilors, in their zeal for uniformity of practice in the British dominions, sacrificed the substance, equity, for the shadow, the chancellorship.

As a man, after an amputation, makes shift as best he can with an artificial limb, so Pennsylvania proceeded slowly to construct a substitute for the discarded court. That the loss was not acutely felt, or at least realized, may be inferred from the fact that we hear no more on the subject from the legislature, where real or fancied grievances were then aired with greater persistency than in these days of unlimited appropriations and limited debates. The court act of 1722, previously quoted, conferred upon the supreme court the power to exercise its jurisdiction as fully as the justices of the king's bench, common pleas and exchequer at Westminster might do, and a plea might have been made for the exercise by the supreme court of the chancery powers

of the barons of the exchequer. But the ill success that finally attended the efforts of Governor Cosby of New York to maintain this position, in his celebrated suit against his predecessor, Rip Van Dam, would have discouraged any one from urging a view so unpopular.¹ The orphans' court was, within its field, a court of equity, and, in regard to the estates of minors, exercised the functions of the chancellor.

The fact that our pre-revolutionary reports are confined to the notes of a few lawyers makes it doubly difficult to investigate the beginning of the system by which equitable principles were worked out through common law forms. The first case in which the subject is mentioned is *Swift v. Hawkins*,² where, in an action of debt on a bond, the court under the plea of payment, admitted evidence of want (probably a misprint for failure) of consideration, which, said Chief Justice Allen, was a necessity, to prevent a failure of justice, there being no court of chancery in the province; and this, he said, he had known to be the constant practice of the courts for thirty-nine years past. If the chief justice is accurately reported this would carry the practice back to 1729, before the abolition of the court of chancery, but Chief Justice Allen was in a position to speak with authority, having sat in the common pleas as early as 1732.

In *Wharton v. Morris*,³ Chief Justice McKean, in charging the jury on the question as to whether a bond payable in "lawful current money of Pennsylvania" could be paid in depreciated currency, remarked that—

"The want of a court with equitable powers, like those of the chancery in England, had long been felt in Pennsylvania. The institution of such a court, he observed, had once been agitated here, but the houses of assembly, antecedent to the

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¹ Lamb's History of New York, Vol. I, 536, Vol. II, 54.

² 1 Dallas's Reports, 17 (1768).

³ 1 Dallas's Reports, 125 (1785).

revolution, successfully opposed it; because they were apprehensive of increasing, by that means, the power and influence of the governor, who claimed it as a right to be chancellor. For this reason, many inconveniences have been suffered. No adequate remedy is provided for a breach of trust; no relief can be obtained in cases of covenants with a penalty, &c. This defect of jurisdiction has necessarily obliged the court, upon such occasions, to refer the question to the jury, under an equitable and conscientious interpretation of the agreement of the parties."

In the same year, the court of common pleas of Philadelphia County in *Dorow v. Kelly*,¹ held that a simple contract debt could not be tacked to a mortgage, President Judge Shippen saying, that while the courts of the state had in some instances adopted chancery rules to prevent an absolute failure of justice, there was no necessity in this case to usurp the powers of a court of chancery, an act of assembly having directed the mode of proceeding on mortgages and confined the recovery to principal and interest.

The first statutory efforts to give relief as in equity were, naturally, by private acts, where the interests involved were sufficiently important to warrant a direct interference by the legislature. Among these was an act passed in 1757² to enable certain testamentary trustees to carry out an agreement of the testator by the execution of deeds of conveyance; another in 1761³ to enable trustees to sell lands settled in trust for the Oxford church and with the money arising therefrom to purchase other lands; a third in 1772⁴ confirming the title to land where the deed had, by some accident, been torn and defaced, and a fourth in the same year where the deed had been lost.⁵ One act will serve as an illus-

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¹ 1 Dallas's Reports, 142 (1785).

² September 27, 1757, V Statutes at Large, 315.

³ March 14, 1761, VI Statutes at Large, 100.

⁴ March 21, 1772, VIII Statutes at Large, 245.

⁵ March 21, 1772, VIII Statutes at Large, 254.

tration. Godfrey Brown mortgaged land in Cheltenham township to the Trustees of the General Loan Office of the Province and subsequently conveyed to Philip Fox. Fox paid the mortgage and then it was found that two deeds in the chain of title, that had been pledged to the trustees according to the custom of their office, were lost, and, although diligent search had been made in the loan office and elsewhere, they could not be found. Therefore "to prevent the damages and mischiefs which may arise from the loss of the said deeds," on petition of Philip Fox, it was enacted that the grantors in said deeds and their heirs be barred and forever excluded from all claims to the said premises which should vest in the petitioner absolutely, saving the rights of others than the said grantors.¹

The first legislative attempt to give equitable relief by a general act, was contained in the Act of January 22, 1774,² to compel trustees and assignees of insolvent debtors to execute their trusts. By this law the courts of common pleas were empowered, on petition, to appoint commissioners to audit the accounts of such trustees and upon their report to order the trustees to forthwith pay the creditors their just proportions of the funds with which they were charged.

The next halting step was taken in the constitution of 1776 which contained the following clause:—

"The supreme court and the several courts of common pleas of this commonwealth shall, besides the powers usually exer-

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¹ May 20, 1767, VII Statutes at Large, 122. There is an interesting act of September 29, 1781, X Statutes at Large, 366, by which a title was confirmed to an equitable grantee who had failed to get a legal title, owing to the error of a conveyancer, but the commonwealth had a direct interest in the case because the legal title had, by the error referred to, become vested in an attainted traitor whose lands had been forfeited.

² VII Statutes at Large, 382. Supplied March 24, 1818.
7 Smith's Laws of Pennsylvania, 131.

cised by such courts, have the powers of a court of chancery, so far as relates to the perpetuating testimony, obtaining evidence from places not within this state, and the care of the persons and estates of those who are *non compos mentis*, and such other powers as may be found necessary by future general assemblies, not inconsistent with this constitution."¹

No such other powers were conferred except by the Act of March 28, 1786,² which authorized the supreme court upon bill setting forth the loss of deeds or other writings, to issue a subpœna, requiring the persons named to appear and answer; to refer the matter to a master and upon his report to make such order and decree as to justice and equity should appertain. This statute appears to have been occasioned by the frequent complaints of the loss of deeds which could only be remedied by private acts such as those already referred to. By the Act of September 28, 1789,³ proceedings akin to discovery were authorized in foreign attachment. The plaintiff after judgment against the defendant was permitted to exhibit interrogatories to the garnishees, who were required to answer under oath.

On the twenty-fourth of November, 1789, there met at Philadelphia a convention to draft a new constitution for the state. The members were abler and more representative men than those who had framed the short-lived constitution of 1776. The committee of nine who prepared the first draft of the proposed constitution included James Wilson, William Lewis, Alexander Addi-

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¹ Chapter II, section 24 of the Constitution of 1776, Proceedings of the Constitutional Conventions of 1776 and 1790, 61; Act of January 28, 1777, § 4; 1 Smith's Laws of Pennsylvania, 427.

² 2 Smith's Laws of Pennsylvania, 375. This act was limited to five years, but was revived and extended to the court of common pleas in 1793 and made perpetual by the act of February 16, 1866, P. L. 50.

³ 2 Smith's Laws of Pennsylvania, 500.

son and James Ross. The plan submitted by them included a high court of chancery presided over by a chancellor with state-wide jurisdiction, and a court of chancery in each judicial district, or circuit, except that in which the high court should be held, presided over by the president judge of the court of common pleas with the same power as the chancellor except that of granting injunctions to stay proceedings or suspend judgments at law. From a decree in chancery in any circuit an appeal was allowed to the chancellor of the state. Determined opposition to this plan developed in the convention and after a prolonged contest in committee of the whole, the provision for a court of chancery was struck out of the judiciary article and limited equity powers were conferred on the existing courts in the following words:—

Art. V. Section VI. "The supreme court and the several courts of common pleas shall, beside the powers heretofore usually exercised by them, have the powers of a court of chancery so far as relates to the perpetuating of testimony, the obtaining of evidence from places not within the state, and the care of the persons and estates of those who are *non compotes mentis*. And the legislature shall vest in the said courts such other powers to grant relief in equity as shall be found necessary; and may, from time to time, enlarge or diminish those powers; or vest them in such other courts as they shall judge proper for the due administration of justice."¹

So ended the last effort to obtain a separate court of chancery in Pennsylvania. This much was conceded, the legislature was authorized not only to extend the equity powers of the existing courts, but to vest them in such other courts as they should judge proper. But the latter power was not exercised by the creation of a separate court, nor were equity powers conferred upon

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¹ Proceedings of the Constitutional Conventions of 1776 and 1790, 159, 301, 350, 354, 362, 364.

the ordinary courts in a systematic manner. From time to time, under the compulsion of sheer necessity, equitable jurisdiction was extended by a series of acts the mere recital of which is wearisome.¹ Delaware, however, whose political and judicial history was so long and so intimately associated with that of Pennsylvania, took the step declined by her sister commonwealth and established a separate court of chancery by the constitution of June 12, 1792.²

As we have seen, the constitutions of 1776 and 1790 expressly conferred upon the courts the power to grant relief in certain cases. Of these, the first, the perpetuation of testimony, was exercised directly under the constitution in accordance with chancery practice; the second, the obtaining of evidence from places out of the state, by commissions and rule of court;³ as to the third, the care of idiots and lunatics, the power of determining the question of insanity was exercised through the medium of a commissioner and inquest according to chancery practice.⁴ In addition the legislature by a series of acts, prior to 1836, conferred additional powers the most important of which were to compel trustees to account, to discharge and dismiss them, to compel the conveyance of the legal estate where the trust had expired, to compel discovery in aid of execution in certain cases relating to corporations and corporate stock, and to compel the specific performance of a contract

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¹ Troubat and Haly's Practice, chapter II.

² American Constitutions, 179.

³ In *Taylor v. Jolly*, Supreme Court of Pennsylvania, September Term, 1773, Docket 6, 365, there is a rule to take the depositions of a witness in New Jersey "before any magistrate there," on three weeks' notice.

⁴ This practice as well as the whole subject of lunatics and habitual drunkards was soon afterwards regulated by the act of June 13, 1836, P. L. 592, and its supplements.

for the sale of lands, where the vendor had died, by an order empowering the executors or administrators to execute a deed.¹

If the sum total of legislation seems meagre today, it can only be said that public opinion in regard to law reform moves slowly, and the bar, while dissatisfied with some features of the system, was not clear as to the direction reform should take. As will be seen presently, the simpler equities had been worked out through the common law actions and it was thought practicable to extend this method by the revival of neglected actions and an extension of their remedial effects. Such was the thesis maintained by Mr. Laussat in his brilliant essay² and the favorable reception it received shows how obstinately loyal a bar may become to an inadequate system that they have been taught to revere. These views were respected by the commissioners to revise the civil code when, in 1835, they took up the question of equity. Some of the subjects ordinarily dealt with in a court of chancery, such as mortgages, they found had been fully covered by statutes; others could be covered in the same manner by acts that they had prepared; others were within the sphere of the orphans' courts. It was in the peculiar means of administering preventive justice that the courts of equity possessed a decided superiority over the courts of law, and it was here that the Pennsylvania system was most defective and the recommendations of the commissioners most radical. The commissioners were opposed to a separate court of chancery as unnecessary, and also opposed to keeping up a separate chancery organization in the existing tribunals. The courts, they

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¹ Rawle's Equity in Pennsylvania, 61.

² Laussat's Equity in Pennsylvania (1826). This essay was prepared as a student's dissertation for the Law Academy.

said, had pursued certain established modes of practice which now for more than a century had become familiar to the community. "To recast the whole system then, to establish a class of equitable remedies for all equitable cases, and to confine the common law procedure to common law subjects," would produce, they thought, "greater inconveniences than any benefit which might be supposed in theory to arise from the change."¹ Upon the whole, they thought that the safest plan to pursue was to give relief whenever possible by some familiar common law remedy, and when full relief could not be given by such process, to resort by statute to the methods of the chancery courts.

Upon the recommendation of the commissioners the legislature extended the equity powers of the courts as follows in the Act of June 13, 1836:²—

"The Supreme court, and the several courts of Common Pleas, shall have the jurisdiction and powers of a court of Chancery, so far as relates to—

"I. The perpetuation of testimony:

"II. The obtaining of evidence from places not within the state:

"III. The care of the persons and estate of those who are *non compos mentis*:

"IV. The control, removal and discharge of trustees, and the appointment of trustees, and the settlement of their accounts:

"V. The supervision and control of all corporations other than those of a municipal character, and unincorporated societies or associations, and partnerships:

"VI. The care of trust monies and property, and other monies and property made liable to the control of the said courts.

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¹ Report of the Commissioners to Revise the Civil Code on the Administration of Justice, January 9, 1835.

² § 13, P. L. 784. Article V, § 3 of the Constitution of 1874 deprived the Supreme Court of original jurisdiction in Equity, except in cases of injunction where a corporation was a party defendant. The district court was abolished.

"And in such other cases, as the said courts have heretofore possessed such jurisdiction and powers, under the constitution and laws of this commonwealth.

"And in every case in which any court as aforesaid, shall exercise any of the powers of a court of Chancery, the same shall be exercised according to the practice in equity, prescribed or adopted by the Supreme court of the United States, unless it be otherwise provided by act of assembly, or the same shall be altered by the Supreme court of this commonwealth, by general rules and regulations, made and published as is hereinbefore provided; and the Supreme court when sitting in banc, in the city of Philadelphia, and the court of Common Pleas for the said city and county, shall besides the powers and jurisdiction aforesaid, have the power and jurisdiction of courts of Chancery so far as relates to—

"I. The supervision and controul of partnerships, and corporations other than municipal corporations.

"II The care of trust monies and property, and other monies and property made liable to the controul of the said courts.

"III. The discovery of facts material to a just determination of issues, and other questions arising or depending in the said courts.

"IV. The determination of rights to property or money claimed by two or more persons in the hands or possession of a person claiming no right of property therein.

"V. The prevention or restraint of the commission or continuance of acts contrary to law, and prejudicial to the interests of the community or the rights of individuals.

"VI. The affording specific relief, when a recovery in damages would be an inadequate remedy: *Provided*, That in relation to the discovery of facts material to a just determination of issues, and other questions, the District court for the city and county of Philadelphia, shall have the same power and authority, within its jurisdiction, as is hereby conferred on the court of Common Pleas for the said city and county: *And provided further*, That no process to be issued by the said courts of the city and county of Philadelphia, or the Supreme court sitting therein, under the chancery powers herein specially granted, excepting such as have heretofore been exercised shall at any time be executed beyond the limits of the city and county aforesaid."

In conferring these powers the legislature did not adopt in full the recommendations of the commissioners,

who in the bill reported by them embraced the whole state as the field for the operation of chancery remedies, but confined a portion to Philadelphia County, yielding to the prejudices of the interior counties where want of familiarity with the forms of chancery procedure had created a special distaste for a change in practice. The unqualified success of the extension of equity jurisdiction in Philadelphia County led to a rapid change of opinion; in twenty years the wisdom of the commission's recommendations was vindicated and the courts of common pleas of all the counties were invested with the same equity powers that the courts of Philadelphia possessed.¹ These powers had in the meantime been increased by an extension to all cases of fraud, accident, mistake, account,² discovery,³ dower and partition.⁴ The extension of equity jurisdiction to partition was most advantageous, since the court could upon bill determine the rights of the parties in a far more satisfactory manner than by a common law action, which would rarely be resorted to now were it not for the fear of the expense involved in a reference to a master.

A catalogue of the statutory additions to the equity powers of the courts would unnecessarily prolong this discussion. They will be found in the digests and books on practice. In one important particular it became necessary to rectify the opinion of the commissioners that the remedy by *scire facias sur mortgage* was adequate by an extension of the equity powers of the common pleas to corporation mortgages. It having been held that the trustee named in a corporation mort-

¹ Act of February 14, 1857, P. L. 89.

² Acts of June 13, 1840, § 39, P. L. 671, April 16, 1845, § 3, P. L. 542.

³ Act of April 10, 1848, § 4, P. L. 449.

⁴ Act of March 17, 1845, § 3, P. L. 158, made general by the Act of July 7, 1885, § 1, P. L. 257.

gage could not maintain a bill to foreclose, an act was passed conferring this necessary power.¹ With respect to charities, legislation also became necessary to give effect in a limited extent to the doctrine of *cy-pres*.²

As important as any clause in the Act of 1636 was that which empowered the supreme court to adopt equity rules for the whole state which the courts of common pleas could neither disregard nor suspend.³ The power has been wisely exercised by the adoption of clear and concise rules that have operated as a check upon slovenly practice and furthered that uniformity which should characterize the administration of justice. In the interest of economy, regularity and certainty it is unfortunate that the same course has not been adopted in regard to actions at law. A recent act⁴ provides that where a bill in equity has been filed, if the defendant desires to question the jurisdiction of the court, he must do so by demurrer or answer, explicitly so stating, or praying for an issue; otherwise the right of trial by jury shall be deemed to have been waived. If the demurrer or answer avers that the suit should have been brought at law, that issue shall be decided *in limine* before hearing on the merits, and if the court decide that the suit should have been brought at law it shall certify the case to the law side of the court at the cost of the plaintiff. So, on appeal, if the decision of the appellate

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¹ *Ashurst v. Iron Company*, 35 Pennsylvania Reports, 30 (1860). Act of April 11, 1862, P. L. 477; Act of May 5, 1876, P. L. 123.

² Act of April 26, 1855, P. L. 331.

³ *Chester Traction Co. v. Philadelphia W. & B. R. Co.*, 180 Pennsylvania Reports, 432 (1897).

⁴ June 7, 1907, P. L. 440; *Naomi Coal Co. v. Moore*, 18 Pennsylvania District Reports, 616 (1908); *Harton v. Hildebrand*, 57 Pittsburg Legal Journal, 129 (1909); *Kingston Coal Co. v. Coal Company*, 14 Luzerne Legal Register, 267 (1909).

court is that the suit should have been brought at law it shall remit the cause with directions to transfer it to the law side of the court.

It is necessary to say something in reference to the nature of the equitable relief administered through common law forms, a subject of unusual interest inasmuch as it has had a profound influence upon the development of legal procedure in the commonwealth. Independently of the form of action, it has been said, "our courts will advance the equitable rights of plaintiffs, where, through some accident that occurred anterior to the institution of his suit, or that happens during its pendency his common law remedy would be taken away or rendered nugatory."¹ An early case illustrating this principle is *Respublica v. Coates*,² an action of debt on a bond brought in the supreme court against the defendant as surety. Levy, for the plaintiff, moved for a rule to show cause why the declaration should not be amended by striking out the *profert* and averring the loss of the obligation. Lewis and Sergeant, for the defendant, declared that they would not object to the rule being made absolute, as they apprehended a late authority had settled the practice in England.³ The court made the rule absolute, declaring that it was absolutely necessary such practice should be adopted here to prevent a failure of justice, there being no court of chancery to protect against such accident.

The common law actions that were made the vehicles of equitable rights were assumpsit, debt, covenant, replevin, ejectment and partition; in fact nearly all the personal actions have been employed to support equitable

¹ Troubat and Haly's Practice (edition of 1837), 55.

² 1 Yeates's Reports, 2 (1791).

³ *Read v. Brookman*, 3 Term Reports (1789), where it was held by a majority of the court that a deed might be pleaded as lost without a *profert*.

claims. "I do not like the idea," said Mr. Justice Huston, "that our equitable powers are more extensive in one form of action than another."¹ Assumpsit is an equitable action and lies, according to the familiar phrase, in all cases where the defendant has money which *ex æquo et bono* belongs to the plaintiff.² Thus where there had been a recovery in ejectment against tenants and the landlord died, it was held *indebitatus assumpsit* would lie against the landlord's executors to recover rents received, from the time the plaintiffs' title accrued, as a substitute for a bill in equity, and the question was submitted to the jury as to whether the defendant's testator had misrepresented their title to the plaintiffs and concealed the defects in his own.³

An illustration of the free use of the equitable powers of the court will be found in *Bixler v. Kunkle*,⁴ an action of assumpsit for money had and received by the defendants to the use of the plaintiff. It appeared that plaintiff's father had by his will directed his executors to lay out a certain sum in land for the plaintiff's separate use and that the executors had procured a release from her by fraud on payment of about one half of what was due. Judgment was entered for the plaintiff, the money to be paid into court and expended under the court's direction in the purchase of land according to the will. Chief Justice Gibson, however, thought that the judgment exceeded the powers of the court, although jurisdiction to decree a trust would be most salutary.

So also, where by articles of agreement for the sale of land a deed was to have been delivered on a certain

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¹ *Pidcock v. Bye*, 3 Rawle's Reports, 183 (1831) at page 195.

² See the cases collected in Pepper and Lewis's Digest of Decisions, Vol. II, col. 1632.

³ *Haldane v. Fisher*, 1 Yeates's Reports, 121 (1792).

⁴ 17 Sergeant & Rawle's Reports, 298 (1828).

date, and in covenant on the articles it appeared that it had been verbally agreed that delivery should take place on a subsequent date, Chief Justice Tilghman was of the opinion that the action could have been supported if the declaration had been amended so as to set forth the alteration of the agreement. "I see," he said, "no certain mode of doing equity to both parties, but by issuing a writ of covenant in the usual form and permitting the declaration to partake so much of the nature of a bill of equity as to set forth the truth of the case. To this the defendant may plead anything which in law or equity will serve him, and thus the parties may go to trial on the merits of the case." And Mr. Justice Gibson added: "The declaration is in effect a bill in equity; for in England the plaintiff could not recover in a court of law: I cannot, therefore, see why those equitable circumstances that are the very foundation of the action, should not be set forth. Performance by the plaintiff at a subsequent day, and acceptance by the defendant, is in equity equivalent to performance strictly at the day, and ought to have been alleged here. Principles of equity cannot be administered through common law forms, strictly such, without having recourse to fiction, which leads to serious inconvenience. The facts as they exist ought, in all cases where it is practicable, to be set forth."¹

Replevin had from the earliest times a wider scope than in England, being applicable in every case in which goods and chattels in the possession of one person were claimed by another.² So too, in partition an equitable estate was held sufficient to support the action, as in

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¹ *Jordan v. Cooper*, 3 Sergeant & Rawle's Reports, 564 (1818). For an action of debt see *Huber v. Burke*, 11 Sergeant & Rawle's Reports, 238 (1824).

² *Weaver v. Lawrence*, 1 Dallas's Reports, 156 (1785).

Stewart v. Brown,¹ where it was held that if a person purchase land at a tax sale under an agreement that another should be equally concerned, he would be considered as holding for the plaintiff and himself as tenants in common. The technical and nearly obsolete action of account render was frequently resorted to as a substitute for the bill in equity for an account. The action of ejectment became at an early date, through the ingenuity of the courts, the most important mode of enforcing the equity of a plaintiff in real property. In *Hawthorn v. Bronson*,² it is thus described by Mr. Justice Duncan:—

“The equitable action of ejectment, in this state, forms a considerable branch of the law. From the nature of our original titles, settlement-rights, warrants and applications, all imperfect rights, so variant in their circumstances from other countries, our courts of justice have been obliged to form a system of laws adapted to this species of title, and accommodated to all its circumstances, and which, perhaps, could not, after all our experience, be changed to advantage; and which, indeed, ought not to be changed, however specious the reason might be, as it would tend to destroy all security of title, and introduce new confusion, which nothing but a steady adherence to decisions can prevent. And when to this is added, that in general, the people contract by articles for payment by instalments, and the legal title is seldom made, until all the purchase-money is paid, and the frequent assignment of these articles, we ought not to be surprised at the numerous complicated cases which arise in our courts of law and equity; for they are courts of law and equity distributing justice by the same medium—the instrumentality of a jury. In Pennsylvania, equity is law. Courts give the equitable principles to the jury, as they lay down the legal principles. The facts are for the decision of the jury, as all contested facts must be; but whether, on any state of facts found by the jury, the party is entitled to equity, and the mode, manner and extent of relief, is for the court.”

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¹ 2 Sergeant & Rawle's Reports, 461 (1816).

² 16 Sergeant & Rawle's Reports, 269 (1827).

Wherever chancery would enforce specifically a contract for the sale of land, it is said, the same relief will be granted in Pennsylvania by ejectment.¹ Thus ejectment lies by the vendor against the vendee in possession under articles who has paid part of the purchase money and defaulted on the remainder.² So also by the vendee, upon tendering the purchase money.³ Difficulties were encountered, as might be expected, in cases involving a construction of the statute of frauds which are too technical for discussion here.⁴

The interest of the assignee of a chose in action was also recognized and protected in actions at law, and on the other hand, the assignee made liable to set-offs and costs in the same manner as if the suit had been instituted in his own name. The practice which prevailed from a time antedating the Revolution was to bring the suit in the name of the assignor and mark it to the use of the assignee.⁵

It was a somewhat simpler matter to give effect to the equities of a defendant, since this did not involve an extension of the scope of common law writs or the revival of obsolete actions as substitutes for chancery procedure. The rules of pleading and evidence interposed the chief barrier to the admission of equitable defenses

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¹ Laussat's Equity in Pennsylvania, Troubat and Haly's Practice, chapter on Ejectment.

² *Mitchell v. De Roche*, 1 Yeates's Reports, 12 (1791).

³ *Hawn v. Norris*, 4 Binney's Reports, 77 (1811).

⁴ The Pennsylvania Statute of Frauds; Act of March 21, 1772, 1 Smith's Laws of Pennsylvania, 389, omitted the fourth section of the Act of 29, Charles II, chapter 3, making it possible to bring an action for damages for breach of parol contracts relating to land. *Wilson v. Clarke*, 1 Watts & Sergeant's Reports, 554 (1841). Lewis's Cases on Specific Performance, 128. Pepper and Lewis's Digest of Decisions, Vol. 20, col. 34592.

⁵ *McCullum v. Cox*, 1 Dallas's Reports, 150 (1785). *Wheeler v. Hughes*, 1 Dallas's Reports, 23 (1776).

and these were broken down at an early period. And whatever may be said as to the insufficiency of the remedies afforded to a plaintiff, it must be admitted, as observed by Mr. Rawle,¹ that the protection given to a defendant in Pennsylvania was in advance of the law as elsewhere administered. There were two ways in which it was possible to present the equity of a defendant, first by giving evidence of equitable matter, under a general plea, and second, where from the nature of the case it was improper to make a defense under a general plea by pleading specially the facts constituting the equitable grounds of defense.²

The first reported case describing the practice of giving in evidence, under the plea of payment, matters of equitable defense is *Swift v. Hawkins*³ already referred to, "the Magna Charta," says Mr. Justice Duncan, "of this branch of equity."⁴ Seven years later, in 1775, the supreme court, to prevent surprise at trials, adopted a rule that every person, intending to give special matter in evidence under the general issue, must give notice in writing ten days before trial of the special facts he intended to rely on and, because it had been adjudged that under the plea of payment the defendant might give evidence that a bond or specialty was given "without any or good consideration," for the future in all such cases, the defendant should thirty days before trial give notice in writing of his intention to offer such evi-

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¹ Rawle's Equity in Pennsylvania, 63.

² Laussat's Equity in Pennsylvania, 66. Of the second class of cases, *Pollard v. Shaffer*, 1 Dallas's Reports, 210 (1787), is an example.

³ 1 Dallas's Reports, 17 (1768).

⁴ *Mackey v. Brownfield*, 13 Sergeant & Rawle's Reports, 240 (1825).

dence.¹ From that day every practicing attorney in Pennsylvania has, at some time in his career, started from his sleep in the middle of the night in a cold sweat, wondering if he *did* give notice in that case on tomorrow's list.

Where an equitable defense is set up under the plea of payment with notice of special matter, the plea is a substitute for a bill in equity, and under it the jury may and should presume everything to have been paid which in equity and good conscience the defendant ought not to be compelled to pay. The nature of the plea, says Chief Justice Gibson,² has frequently been misunderstood. It is not the general issue. As an equitable plea it makes room only for what would sustain a bill in chancery, and as a legal plea it makes room only for evidence of direct payment, or what is the equivalent of payment where the plea is directed by act of assembly. The various equitable defenses permitted under the plea may be classed under the familiar heads of fraud, accident, mistake, and failure of consideration.³ The same liberality as to evidence was not favored under the plea of non assumpsit. It was said by Chief Justice Tilghman⁴ that if the circumstances afforded grounds for relief in equity, the defendant should give notice of special matter under the plea of payment.

In the action of covenant, the plea of performance, or covenants performed, almost obsolete in England, was,

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¹ Rule of Supreme Court of Pennsylvania, April 10, 1775, Docket No. 7, page 291. Section 7 of the procedure act of May 25, 1887, P. L. 271, provides: "The pleadings in all courts to be subject to the rules of the respective courts as to notice of special matter."

² *Lewis v. Morgan*, 11 Sergeant & Rawle's Reports, 234 (1823). Compare *Hollingsworth v. Ogle*, 1 Dallas's Reports, 257 (1788).

³ Pepper and Lewis's Digest of Decisions, Vol. 16, col. 27376.

⁴ *Dunlap v. Milcs*, 4 Yeates's Reports, 366 (1807).

with notice of special matter held sufficient to support any evidence which would discharge the defendant in equity.¹ In ejectment an equitable defense would protect the defendant's possession, but by statute² the plea of "not guilty" was the only one allowed. There was also permitted, in addition to the statutory set-off, an equitable defense in the nature of set-off applicable to acts of nonfeasance or misfeasance by the plaintiff connected with his cause of action, not matter of defalcation but directed to the defeat of the claim in whole or part. As to replications and subsequent pleadings, if a plea was put in founded in equity the plaintiff was permitted in reply to set up any special facts sufficient to destroy that equity.³

Another powerful instrument in the administration of equity under common law forms was the conditional verdict frequently used as a substitute for an injunction or a bill for specific performance. In such a case, where the plaintiff had set out in his declaration the whole ground of his equitable right, the jury under the direction of the court might find large damages to be released on condition of compliance with the terms prescribed by the verdict, which terms were for the jury alone to impose.⁴ So also the power of the court to control or open judgments has been exercised according to equitable principles and with a view to preventing injustice under color of law.

Such then is the system which Horace Binney contemptuously described as "a spurious equity compounded

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¹ *Bender v. Fromberger*, 4 Dallas's Reports, 436 (1806).

² Act of April 13, 1807, 4 Smith's Laws of Pennsylvania, 476.

³ *McCutchen v. Nigh*, 10 Sergeant & Rawle's Reports, 344 (1823).

⁴ *Clyde v. Clyde*, 1 Yeates's Reports, 92 (1791); *Decamp v. Feay*, 5 Sergeant & Rawle's Reports, 323; *Moyer v. Germantown Railroad Co.*, 3 Watts & Sergeant's Reports, 91 (1841).

of the temper of the judge and the feelings of the jury, with nothing but a strong infusion of integrity to prevent it from becoming as much the bane of personal security as it was the bane of science."¹ The early bar, however, regarded it much as a mother does a deformed child; they loved it, they doctored it and resented reflections upon its symmetry and efficiency.² Extravagant notions were at one time entertained as to the possibility of extending the system by the employment of long forgotten actions, such as the assize of nuisance,³ and by widening the scope of the writ of *scire facias*.⁴ As has been shown, more sensible counsel prevailed and limited chancery powers were extended to the courts by statute.

If the court of chancery had been excluded in the eighteenth century from our system of justice as the first step in a movement for the scientific reform of procedure, the result might have been far-reaching. But it was not. Political considerations dictated the change and the best legal opinion of the day was adverse to the innovation. Anglo-American jurisprudence was founded on the inherited conception of a dual system, law and equity, each with its distinct functions. The excision of equity crippled and paralysed the administration of justice. Having destroyed chancery forms, the next logical step should have been to abolish all distinctions between common law forms and substitute one simple

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¹ Eulogy on Chief Justice Tilghman, 16 Sergeant & Rawle's Reports, 448; *Gochenauer v. Cooker*, 8 Sergeant & Rawle's Reports, 187 (1822), Gibson, J., at page 192.

² Opinion of Chief Justice Black in *Finley v. Aitken*, 1 Grant's Reports (Pa.), 83 (1854), at page 95.

³ *Livezey v. Gorgas*, 2 Binney's Reports, 192 (1809). The record of the trial will be found in Brackenridge's Law Miscellanies, 438. See also *Barnet v. Ihrie*, 17 Sergeant & Rawle's Reports, 174 (1828).

⁴ Laussat's Equity in Pennsylvania, 136.

method of proceeding, under which equity and law alike could be administered. But such a conception was in advance of the times. Instead, from time to time under the pressure of necessity, efforts were made to administer equitable principles through forms that even for their own legitimate purposes were fast becoming archaic. The result was to create a new series of technicalities requiring a glossary of their own. When chancery powers were conferred upon the courts, the fact that relief was given in common law forms might have presented an obstacle to the exercise of equity jurisdiction in many instances, had not the courts, by a liberal construction of the acts conferring such jurisdiction, insisted that it was not sufficient to oust the jurisdiction of equity that complainant had a remedy at law, unless that remedy was as complete, adequate, practical, efficient and convenient to the ends of justice as that in equity. Nevertheless there are cases where the distinction is still far from clear, a situation that would be ridiculous were it not so serious to prospective litigants.

Another disadvantage that attended the system was that the equities of the respective parties were to a large extent left to the chance decision of a jury, which is more likely to be guided by sympathy or prejudice than the law of the case, or, with the best intentions in the world, is an unsatisfactory tribunal for the determination of complicated questions of fact. No doubt this is one reason for the great number of references to arbitrators to be found on the early dockets.

It is true that for purely defensive purposes the system had decided advantages. It permitted a defendant to put in an equitable defense without resorting to another jurisdiction for relief. But on the offensive it broke down. The common law offered no adequate substitute for the bill for an injunction, to enforce

specific performance of contracts, to reform or cancel instruments, to obtain a receiver, for the bill *quia timet* and the bill of peace. Present social and commercial conditions tend to increase rather than diminish the importance of equity jurisdiction. Such matters as trade-marks, copyrights and patents; corporations, associations and trusts; trade disputes and interstate commerce, present problems that would seem almost incapable of solution except through chancery procedure, either in its original form or as assimilated by code practice, without a revolutionary reconstruction of the entire legal system.

Some reformation of our procedure belongs to the future. Of that we may be certain. It is impossible to imagine that our technical and complicated practice will not fall some day of its own weight and be replaced by a procedure clearer, simpler and more scientific. In that golden age, when the practice of law will be a pleasant diversion and the bringing of a suit the opening bar of a symphony, if one of our learned profession now living is permitted, as a shade, to revisit the scene of his earthly struggles, he will be able, perhaps, to recognize traces of equity procedure, but the common law actions will belong as completely to the past as himself, or, to put it more humanely, as the *actio sacramenti* of the Roman or the weregeld of the Saxon.

CHAPTER V.

In the preceding pages brief references were made to the register's court and orphans' court. The rise of the latter tribunal from a humble beginning to its present important position is sufficiently interesting to warrant a more detailed account of its functions and growth. However unobtrusively the work of its judges may be performed, it should not be permitted to escape attention, for, as Judge Duncan grimly puts it, "as sure as we descend into our graves, so sure into this court we must come."¹

During the American colonial period the settlement of the estates of decedents belonged, in England, principally to the ecclesiastical courts. Briefly, the territory of England was divided into two provinces, Canterbury and York, each presided over by an archbishop or metropolitan. Each of the provinces was divided into dioceses. With exceptions, which it is unnecessary to particularize here,² the bishop of the diocese where the decedent had his last domicile had the power to appoint the administrator and settle his accounts, and where there was a will, it was proved before him and letters testamentary issued thereon. When so acting, he was called the "ordinary" and held what was called the "consistory court," either in person or by a deputy styled his commissary. From this court an appeal would lie to that of the archbishop and thence to the king in chancery, that is, to the "court of delegates," appointed by the king's commission under the great seal.

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¹ *McPherson v. Cunliff*, 11 Sergeant & Rawle's Reports, 431 (1824).

² Williams on Executors, Part I, Book 4, chapter 1.

Here and there were districts called "peculiar," exempt from the jurisdiction of the ordinary and subject to the metropolitan only. The court of appeal of the Archbishop of Canterbury was called the Court of the Arches, because formerly held in the church of Saint Mary le bow (*Sancta Maria de arcubus*), and was presided over by the "dean of the arches." If the decedent left *bona notabilia* or chattels to the value of one hundred shillings in two different dioceses or jurisdictions, then probate or administration belonged to the archbishop, by way of special prerogative, and the matter was cognizable in the 'prerogative court' before a judge appointed by the archbishop.¹

Such a system was wholly impractical in America, where the principle of an established church, even in the most loyal colonies, never gained more than a precarious foothold. It would have met with the opposition not only of the many sects into which the emigrants were divided, but also with that, probably, of the common lawyers, whose jealousy of the canonists and civilians was then at its height. But the feeling that probate and administration were something separate and apart from the common law was sufficiently strong in most of the colonies to lead to the creation of separate tribunals for the exercise of jurisdiction over decedents' estates, and to the retention of, at least, a supervision over such matters by the governor and council.² By a law of the colony at Plymouth of 1633 wills were to be probated before the governor and council,³ while in Maryland in the records of the court held at St. Mary's by the proprietor and his council, beginning 1637, are

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¹ Blackstone's Commentaries, Vol. II, 590, Vol. III, 64.

² Article on Wills by L. M. Dagget in *Two Centuries' Growth of American Law*, 167.

³ Laws of the Colony of New Plymouth (Edition of 1836), 32.

many instances of the grant of probate or administration as well as of the settlement of executors' accounts.¹ In the Massachusetts Colony probate of wills was to be made at the county court, but by an act of 1652 two magistrates with the recorder or clerk of the county court meeting together were authorized to allow wills and grant administration, reporting to the county court.² The charter of 1692 made the governor and council a court of probate, although these officials seem to have exercised their jurisdiction through the county judges, with an appeal reserved to the governor and council as a supreme court of probate.

As we have previously seen, the Duke of York's laws for the government of New York were in 1676 put in force in the settlements on the Delaware by Governor Andros. These laws contained minute provisions for the care of the property of decedents. Upon the death of any person it was made the duty of the constable with two overseers of the parish to "repair to the house of the deceased party to enquire after the manner of his death and of his will and testament and in case none doth appear or shall be produced, it may be taken for granted that the person died intestate," whereupon security was to be taken for the care of the estate until the next court of sessions, where all cases of probate and administration were to be adjudged. Administration was to be granted to the widow or children upon the entry of security and an inventory filed.

"But in case the deceased Dye without widow or Child, then the estate, for the better improvement thereof shall be sould by order of the Court at an Outcry, and the purchasers all puting Security, and Acknowledging Judgment for their debt which by the Court shall be Assigned to the several Creditors

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¹ Maryland Archives, Judicial and Testamentary Business of the Provincial Court, 12.

² Laws of the Colony of Massachusetts (1672), 157.

of the decendant, and paid according to the priority of Law and the Surplusage remaining, if any, to be delivered to the next kinsman of the decendant, if he appears or if none prove himself such within one year and six week, Then the Court to give an accompt of the said Surplusage to the Governour. And when the widow or Child Administers the surplusage after debts paid and the funerall Charges according to the quality of the person allowed for, shall be equally divided between the Widow and Children, viz. one third of the personall Estate to the widow and the other two thirds amongst the Children, provided the Eldest Sonne shall have a double portion, and where there are no Sonnes the daughters shall Inherit as Copartners, and if any of the Children shall happen to dye before it come to age his portion shall be divided amongst the surviving Children.

"If any person shall renounce his Executorship or that none of the friends or kindred of the deceased party that shall die intestate shall seeke for Administration of such persons Estate, then the Constable of the Town where any such person shall die, shall give notice thereof to the next Court of Sessions; that so the Court may take order therein, as they shall think meet, who shall also allow such Constable due recompence for his pains But if the Constable shall fail therein, he shall forfeit forty Shillings to the publique Treasury.

"That the Clarke of the sessions when he carries the Probates or Commissions of Administration to be signed do then also Certify unto the recorders Office at New York, the name of the testator or the party deceased the Executors or Administrators and their Security, the County and Parrish where they dwelt And the Court wherein the Administration is granted to the end that strangers and other Creditors invested in the Estate may be the better Enabled to find out the Records in which the accompts of the estate is entered and be informed how they may come to their just dues."¹

Executors failing to probate wills and persons intermeddling with the goods of a decedent were made liable for the debts of the decedent whether the estate was sufficient for that purpose or not.

The conferring of probate jurisdiction upon the courts of sessions is an indication of New England influence in

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¹ Charter and Laws of Pennsylvania, 5, 6.

the framing of the laws. About 1686 instructions from the home government reserved to the governor the probate of wills, after which the governor or the secretary of the province exercised this jurisdiction, and a department grew up in the secretary's office known as the prerogative court, whose jurisdiction was exercised in minor matters by local delegates. The prerogative court was not succeeded by a court of probate until 1778.

In the territories on the Delaware the ordinance of 1676, putting in force the Duke of York's laws, did not expressly concede to the local courts the right to grant administration or probate wills, and such matters were in the hands of the authorities at the seat of government. A case in New Castle against a deceased person was on April 4, 1677, continued until the "letter of administration bee come from New York."¹ Prior to this, the justices of the court at New Castle, in a letter to Governor Andros, dated February 8, 1677, giving an account of local affairs, made the following request:—

"That yo^r Honor will bee pleased soe far to Impower the Commander Captⁿ John Colier or the Court that wills may bee proved before them and Letters of Administracon granted accordingly wth ye fees for the estates of the most part of the People in these parts are so Inconiderable that otherwyse the Charges & Expenses of going to yo^r honor Att New Yorke for to obtaine the same may Prove mutch to the hinderance of such Estates."²

To which the governor replied in a letter dated April 6, 1677, and read at the court held June 8, 1677:—

"The severall Corts May att a session take proofes and security and grant administracon of wills but if above twenty pounds to remit the same here to the secretary's office to bee recorded."³

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¹ Records of the Court of New Castle, 74.

² Records of the Court of New Castle, 66.

³ Records of the Court of New Castle, 98.

The court availed itself of this permission at once and several wills were proved at this term of court. The procedure in one case will serve as an illustration. Rebecca Eghberts, widow of Barent Eghberts, deceased, produced the will of her husband dated October 20, 1674. The two witnesses swore that they were present and saw the testator sign the will. The court then granted "administration" according to the will and directed that it be recorded. In other estates, where the decedents died intestate, administration in the proper sense was granted.

Under the power conferred upon William Penn in the charter of Pennsylvania, to appoint judges, magistrates and other officers, it was provided in the laws agreed upon in England that there should be a register for births, marriages, burials, wills and letters of administration distinct from the office for enrolling deeds.¹ This provision was incorporated in the "Great Law" or body of laws passed at Upland, December 7, 1682,² and Christopher Taylor was appointed Register General for the province and territories. The register general kept his office at Philadelphia and commissioned deputies to act in the respective counties. Taylor, according to Proud,³ was a well educated Yorkshireman, an eminent Quaker preacher and the author of several tracts in defense of their principles. He was also a member of the first provincial council, but did not live long to enjoy his honors, dying in the early part of 1686. His own will is No. 26 on the register.

The first will on record is that of Thomas Fream, proved, apparently, October 10, 1682. Wills and administrations were kept in separate volumes, as is still the

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¹ Charter and Laws of Pennsylvania, 101.

² Charter and Laws of Pennsylvania, 119.

³ Proud's History of Pennsylvania, Vol. I, 236.

practice. The first entries are brief and informal and it probably took some time to settle the forms and practice of the office. The following entry will serve as an example:—

“Philadelphia in the Province of Pennsylvania 2^{mo}/₆ 1683.

“Whereas Mary Mason Relict of the deceased, John Mason did the day of the date thereof appear before me, Christopher Taylor, Register Gen^l of the said Province, &c. desiring to take out Letters of Administration upon the estate of the said John Mason and having given in and attested an Inventory of the said estate with sufficient security to pay his debts and dispose of the remainder according to law I do by virtue of my Commission from William Penn, Proprietary and Govern^r of the said Province and Territories grant Letters of Administration to the said Mary Mason for the ends and purposes aforesaid. Under my hand and the seal of my office.

“Christopher Taylor,

“Regist. Gen^l (SEAL)”

William Clark, the deputy register for Kent and Sussex counties, had served as a justice in the court at the Whorekills under the previous government and became chief justice of the provincial court in 1703. One of his entries is as follows:—

“Whereas William Darnall of the County of Kent, Marchant, did the day of the date hereof appeare before me, William Clark, deputy Register of the Countys of Sussex and Kent in the territories of the Provience of Pensilvania; and desireth as princable Creditor to take out Letters of Administracon upon the estate of Andrew Stocker, deceased, And haveing Given me Good and sufficient securiety to bring in unto me a true inventory of the estate that the said Andrew Stocker dyd possessed of within one moneth after the date hereof soe fer as the same shall com to his knowldge And also to pay his debts soe fer as the Estate will extend and dispose of the Remayner According to Law, I doe therefor by the authority of William Penn, Proprietary and Govern^r of the Provience of Pensilvania and the Territories thereunto belonging & by commicon from Christopher Taylor, Register General of the provience of Pen-

silvania and the Counties of Sussex and Kent Grant Letters of Administracon to the said William Darnall for the ends and purposes A for said. Given under my hand and seale of my office the 18th day of $\frac{mo}{7}$. In the year of our Lord according to the English account 1683.

“William Clark.”¹

In the same volume are recorded inventories of estates as well as records of births, deaths and marriages. The following is curious:—

“These are to give notice unto all persons whatsoever that there is a Marriage shortly intended to be solmonized Betwene Abraham Westron, widdower, and Mary Smith, widdow, if any person have anything justly to object wherefor the said parties should not be Joyned together in marriage Let them Give in there Exceptions unto me to the end that the same may be prevented or elce forever after to be silant in that case. dated at Lewis the 5 day of the $\frac{mo}{8}$ 1683. William Clark.”

During its existence the office of register general was held by men of importance, including Governors Blackwell, Markham, Evans and Gookin, who probably kept it themselves on account of the fees, while among the deputy registers were Patrick Robinson and David Lloyd whose activities in political and legal affairs have been referred to before.

The duties of the register general and his deputies were not defined by legislation until the passage of the Act of January 12, 1705,² an elaborate measure relating to the probate of written and nuncupative wills. This act in its last section provided for the appointment of the register general by the governor and required him

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¹ Sussex County Records, MSS. Historical Society of Pennsylvania. For similar entries, see Turner's Sussex County Records, 133.

² II Statutes at Large, 194; II Colonial Records, 238, January 12, 1705.

to keep an office at Philadelphia and appoint deputies for the other counties, as had been the practice. All of these officers were required to give bonds for the faithful performance of their duties, which were to be recorded in the orphans' court and to be for the use of parties aggrieved.

Failure to keep these positions filled seems to have caused dissatisfaction, for an act was passed June 7, 1712,¹ which, after reciting that "no register has been commissioned and deputies constituted in each county as the act (of 1705) directs," goes on to enact that in case of the removal of the register general by death, or otherwise, another fit person should be commissioned within three weeks; that if the governor failed to act, the agents of the proprietor should appoint, and if they too failed, the judges of the common pleas of Philadelphia should make the appointment. Governor Gookin thought that two months' time was little enough to appoint the officer, and that the office should be kept at Philadelphia for the whole province, for the greater security of the public. The distance, he said, was no objection, for it was well known that people in England traveled much farther on such occasions.² Nevertheless he finally agreed to the bill which became a law and was approved by the queen in council February 20, 1713-4.³

In this statute it was also enacted—

"That where objections are made or caveats entered against the proving of any will or granting letters of administration, and where there is or shall be occasion to take the final accounts of executors or administrators, or make distribution of decedents' estates, the register-general and his deputies, respectively, shall, in every such case, call to their assistance two or

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¹ II Statutes at Large, 421.

² II Colonial Records, 576, May 27, 1712.

³ II Statutes at Large, 541.

more of the justices of the said court of common pleas for the county where they are concerned, who are hereby empowered and required to give their assistance accordingly to decide the said caveats and matters in controversy, settle the said accounts, make distributions, and do all such other judicial acts as do or shall belong or ought of right to be done by any person or persons having power by law to take probate of wills and grant administration."¹

This is the origin of the register's court, as to which more will be said hereafter. It will be noticed that the act seems to contemplate the taking of accounts of executors and administrators before this court, but this jurisdiction, if ever exercised, must have been very limited, for the orphans' court already had jurisdiction of such accounts in cases of intestacy² and where the interests of minors were involved, a jurisdiction defined and amplified by an act passed in the following year.³ When, more than one hundred years later, the act of 1712 was invoked as authority for an attachment issued by the register's court to compel an administrator to account, the supreme court in discharging the prisoner on a writ of habeas corpus said, per Tilghman, C. J.:—

"This law has never been expressly repealed, and so far as concerns caveats, it has been always in force. But the final settlement of the accounts of executors and administrators, and making distribution of the estates of intestates, having been expressly given to the Orphans' Court by the Act of 27 March, 1713, the jurisdiction of the Register's Court, on these subjects, has been supposed to be taken away by implication, and for a long course of time the practice has been to settle final accounts in the Orphans' Court and not in the Register's Court. * * * We are of opinion, that at the time of the adoption of this constitution, the Act of 1712, so far as concerned the final settlement of accounts of executors and

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¹ II Statutes at Large, 423, § 3.

² Act of January 12, 1705, II Statutes at Large, 199.

³ Act of March 27, 1713, III Statutes at Large, 14.

administrators, was not in force, being either repealed by implication or obsolete."¹

As a matter of fact the Orphans' Court Act of 1713 was introduced in the assembly on February 10, 1712, and passed on the sixteenth of the same month, before the register's act, but was held over by the governor, as too important to be hurried, and submitted to Judge Mompesson for his opinion. The judge returned the bill to the governor March 25, 1713, with several proposed amendments. To these the assembly refused to accede and the governor, considering the amendments not essential, agreed to the passage of the bill, which became a law on March 27, 1713.²

During the administration of Governor Fletcher the council heard an informal appeal from the probate of a will by Markham, as appears in the minutes of the council for June 5, 1694.

"His Excellie BENJAMIN FLETCHER.

"Wm. Markham, Esq^r., Leiv^t Governo^r.

And^r Robeson, }
pat. Robinson, } Esq^{rs}.
Wm. Salway, }

Wm. Clarke, }
Geo. forman, } Esq^{rs}.

"His Excellie Having ordered the Hearing of what might be offered ag^t the will of peter de buc, deceased, and severall things being offered by sundrie persons, wherein they seem to insinuate there was fraud and Collusion in the making thereof, His Excellie did, upon hearing therof, dismiss the people, and desired the Council to give their opinions upon the whole matter, Whether or not the will, which was proved befor the Leiv^t Governo^r, Can be allowed or not; Which being putt to the vote amongst the members of Council, was caried in the affirmative, & his Excellie did allow yrof."³

¹ *Commonwealth v. Brady*, 3 Sergeant & Rawle's, 309 (1817).

² Charter and Laws of Pennsylvania, 302.

³ I Colonial Records, 407, June 5, 1694.

The care of the persons and property of orphans was a subject that seems to have particularly appealed to the philanthropic founder of the commonwealth. In England, the lord chancellor was the supreme guardian of all infants and the conduct of both guardian and ward was within the controlling jurisdiction of chancery.¹ As we have already seen, that court was not in favor with Penn or his fellow colonists, and, in respect to this branch of its jurisdiction, they were lucky enough to establish a substitute founded on precedent and successful in operation, the orphans' court.

The name as well as the early jurisdiction of this court was borrowed from the Court of Orphans of the city of London.²

"It has been resolved," says Bohun,—

"That there hath been a Court of Orphans time out of mind in London; and that there hath been a Custom, if any Freeman or Freewoman die, leaving Orphans within age unmarried, that the said Court have had the custody of their Body and Goods: And that the Executors and Administrators have used, and ought to exhibit true Inventories before them; and if any Debt appear due, to become bound to the Chamberlain to the use of the Orphans in a reasonable Sum to make a true Account upon Oath of them, after they have been received and if they refuse, to commit them till they will become bound; and this was adjudged to be a reasonable Custom."³

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¹ I Blackstone's Commentaries, 463.

² *Wimmer's Appeal*, 1 Wharton's Reports, 102 (1836). The court of the burgomaster and schepens of the city of New York acted as an orphans' court during the Dutch period. To relieve the court of this work Stuyvesant created a separate court of orphan masters, which ceased to exist when the colony passed into the hands of the English. Scott's History of the Courts of New York (1909), 40; Records of the Court of New Amsterdam, Vol. II, 341. There is no evidence, however, that this court influenced Penn in establishing orphans' courts in Pennsylvania.

³ Bohun's Privileges of London (Edition of 1723), 314.

The court, it is further said, was held before the lord mayor and aldermen of the city of London. The common serjeant of the city took the inventories and accounts, while all securities for the orphans' portions were taken in the name of the city chamberlain. The court could commit the custody of an orphan to such person as they thought fit, even when the father had devised the custody, and if any person married an orphan without the consent of the court, such person might be "fined by them according to the Quality and Portion of the Orphan; and unless such Person do pay the Fine, or give Security to pay it, the Court may commit him to Newgate, to remain there till he submit to their Orders."

Upon the death of a freeman the widow or executor was summoned to bring in an inventory and appraisement, and when the inventory was so exhibited, the executor was bound either to pay the money due the orphans into the chamber of London, where interest was allowed, or to find security by bond or recognizance to pay the amount due. When the orphans came of age or married, with the consent of the court, they were brought into court with a person to prove their age and there acknowledged satisfaction for their respective portions.

Although somewhat paternal, according to our view, the system was an undoubted privilege when compared with the burdensome incidents of feudal wardship, and, even in 1682, when wardship had been abolished over twenty years,¹ the citizen preferred his own court, to chancery, with its aggravating delays and extortionate fees. Once indeed, the city fathers betrayed their trust. King Charles II succeeded in obtaining from the city a loan of the orphans' moneys, paying interest thereon

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¹ Act of 12 Charles II, chapter 24 (1660).

until 1671, when he closed the Exchequer "and thereby became not only Bankrupt himself, but occasioned the Chamber of the said City to be so also: whereby many Thousand of City Orphans (*heu Pietas Regum!*) were reduced to misery and want,"¹—a wrong that remained unredressed until the reign of William and Mary.²

At the second session of the legislature under the proprietorship of Penn, March 10, 1683, it was enacted—

"That the Justices of each respective County Court, shall sitt twice every year, to inspect and take Care of the Estates, usage, and Employment of Orphans, which shall be called The Orphans' Court, and sitt the first third day of ye week, in the first and eighth month yearly; That Care may be taken for those, that are not able to take care for themselves."³

The same assembly also provided that executors and guardians should give bonds and—

"If any man shall refuse this honest Care and Charge in the government, Unless hee hath five children to take care of, or is already executor to one Will or hath persons nearer related to him, who in all likelihood will impose that Charge upon him; hee shall be fined at the Discretion of the Governor and Provincial Council."⁴

Whether this court was suggested by Penn himself or by one of his followers the minutes of the council do not show. But, at any rate, the idea commended itself to the proprietor, for he mentions it in a letter to the Free Society of Traders dated August 16, 1683. "Spring and fall," he writes, "there is an orphans' court in each county to inspect and regulate the affairs of orphans and widows." In fact the minutes of the Bucks County

¹ Bohun, 336.

² Act of 5 and 6 William & Mary, chapter 10.

³ Charter and Laws of Pennsylvania, 131.

⁴ Charter and Laws of Pennsylvania, 142.

court show Penn presiding in an orphans' court contemporaneous with if not prior to the passage of the act.

"Pennsylvania Bucks SS. At an orphans' court held by the King's authority in the name of William Penn, Proprietary and Governor of the said Province and territory thereto belonging at Gilbert Wheelers' for the aforesaid County, the 4th day of the first month 1683, to take account of improvements and usage of estates of Orphans.

"Present, the Governor, William Penn, Justices—James Harrison, Jona Otter, Wm. Yardley, Wm. Berks, Thomas Fitzwater and Phineas Pemberton Clark.

"The next meeting held by adjournment 11, 1 mo. 1683, Present—Wm. Penn, Governor, James Harrison and Wm. Berks, Justices."¹

At this time some of the business that belonged to the register general and much that afterwards fell to the orphans' court was transacted in the provincial council. In several instances administrators were appointed.² One estate that seems to have given some trouble was that of Christopher Taylor, the former register. It appeared that he had named the proprietor and another as his executors, both of whom were absent at the time of his death. Administration was refused to the son as contrary to the intention of the will and a temporary administrator was appointed, who was to account to the executors or the council.³

The most frequent applications to the council were those for the sale of land for the payment of decedents' debts. Penn in the laws agreed upon in England had incorporated a provision that lands and goods should be

¹ Address of Peter McCall, Esq., before the Law Academy (1838).

² I Colonial Records, 39, 20, 12 mo. 1683; I Colonial Records, 62, 18 4 mo. 1684.

³ I Colonial Records, 137, 5, 5 mo. 1686; 138, 6, 5 mo. 1686; 143, 21 September, 1686.

liable for debts except where there was legal issue and then all the goods and one third of the land only,¹ which provision was incorporated in the Act of December 10, 1682.² The orphans' court was by the Act of 10, 3 mo., 1688, empowered, with the approval of the governor and council, to permit the widow or administrator to sell lands to defray debts, educate the children, support the widow and improve the remainder of the estate.³ After passing through minor changes of form this act was supplied by the Act of November 27, 1700,⁴ which gave the jurisdiction to the orphans' court without the intervention of the council. This act was disapproved by the queen, on the advice of the attorney general, as not sufficiently protecting marriage settlements and the interests of the children,⁵ but the same provisions were incorporated in the intestate Act of January 12, 1705,⁶ in terms carefully framed to meet these objections and the act became a law. It is interesting to note that what was perhaps the first order of sale for debts was verbal, as would appear from the following extract from the minutes of the council:—

"The Petition of Mary Mason, Widdow, was Read; Requesting ye Councill to Confirme ye Sale of Lotts and Lands sold by ye said Widdow, by ye Gov^{rs} Verball order, to pay her Deceased husband's Debts, and for subsistence of herselfe and Children.

"James Harrison being prosent & attesting ye truth of ye Order, and she declaring yt ye Land sould was ye Citty Lotts, and ye Liberty Land, and but two hundred Acres out of one thousand, and not ye Land yt was Improved; ye Councill ordered a Confirmation."

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¹ Charter and Laws of Pennsylvania, 100. See page 28, *supra*.

² Charter and Laws of Pennsylvania, 120, 181.

³ Charter and Laws of Pennsylvania, 180; I Colonial Records, 176, 12, 2 mo. 1688.

⁴ II Statutes at Large, 51.

⁵ II Statutes at Large, 494.

⁶ II Statutes at Large, 199, §§ 3, 4.

⁷ I Colonial Records, 103, 16, 7 mo. 1685.

It will be noticed that the widow took the precaution to have the verbal order confirmed. Another illustration may be given which leaves the reader in some doubt as to the miracle proposed to be accomplished with the fund:—

“Att a Council Held att Philad. die Lunæ, 1st July, 1700.

Present:

“WM. PENN, pro^r and Governor

Edwd Shippin,
Rt. Turner,

Wm. Clark,
John Moll,

Thomas Storie.

“Upon reading the petition of Sarah Gibbs, widdow, setting forth y^t Her Husband Latelie dyed, Leaving her much in debt, & the charge of a sucking child, & having nothing wherwt to pay y^e sd debts but y^e shell of a smal house, unfinisht, & a Lott valued att 50£, yrfor, requesting y^e Gor & Council to allow, permitt, & authorize her to make sale yrof, towards y^e defraying of sd debts, educaon of sd infant & her support, according to the Laws and Customs of sd province. Wheron Rt. turner signified y^t y^e sd allegaons wer true, y^e circumstances yrof being to him well known.

“Itt was yrfor Ordered y^t sd Sarah Gibbs be pmittid, allowed & authorized, & is hereby by y^e Gor & Council pmittid, allowed & authorized, to make sale & conveyance to anie pson qtsoever, of y^e sd house & Lott, wt its improvments and apptenances, & to ym & y^r Heirs & assigns for ever, towards y^e defraying her just debts, y^e educaon & maintainance of sd infant & her owne support, according to y^e Laws & Customs of sd province, to Hold to y^e sd pchasers yrof & y^r heirs & assigns, & to y^r use & behoofe, in fee simple & estate of inheritance forever.”¹

There does not appear to have been any express statutory directions as to the distribution of decedents' estates in general until June 4, 1693, when at the stormy session of that year a bill was passed relating to the distribution of decedents' estates, the order of payment of debts and the disposition of the residue of real and

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¹ I Colonial Records, 552, July 1, 1700.

personal estate, all of which distributions "as well of the Testate's as intestate's estate are to be made by the Register General for the time being, within twelve months after the Decedent's Death."¹ The distributees were required to give refunding bonds to the register general. It was further provided that all executors and guardians of persons under age should give bond to the orphans' court. All of these provisions were substantially re-enacted in the Acts of May 24, 1697,² and of November 27, 1700,³ except that in the latter act the distribution was to be made by the "registers of the counties." The last act was disapproved by the queen.

The jurisdiction of the orphans' court, in matters of accounts, was in some degree widened by the judiciary Act of October 28, 1701,⁴ an act which we have already seen failed to meet the approval of the privy council. By this act the orphans' court was not only given jurisdiction over all executors, administrators and trustees accountable for lands or chattels belonging to orphans or minors, but it was further provided that those who filed inventories, gave bond or made accounts in the orphans' court should not be obliged to account to the register general's office. By the Act of January 12, 1705-6,⁵ relating to intestate estates, complete jurisdiction over the settlement of administrators' accounts and the distribution of the surplus after payment of debts was conferred upon the orphans' court. By this statute, which was allowed to become a law, the orphans' court may be said to have finally departed from the limited

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¹ Charter and Laws of Pennsylvania, 231; I Colonial Records, 390, May 31, 1693.

² Charter and Laws of Pennsylvania, 261.

³ II Statutes at Large, 31, § 3.

⁴ II Statutes at Large, 148, § 8.

⁵ II Statutes at Large, 199.

scope of its London prototype to enter upon a constantly widening field of activities.

The act, however, which is the principal source of orphans' court jurisdiction is that of March 27, 1712-3,¹ passed, as stated in the preamble, to take the place of the prior acts repealed by the queen. It is too long to give in full, but, briefly stated, the justices of the court of quarter sessions were empowered to hold a court of record called the orphans' court, with jurisdiction over the accounts of such persons who as guardians, trustees, tutors, executors or administrators were entrusted with the property, real or personal, of orphans or persons under age, to see that the surety for such persons was sufficient, to revoke their letters, if necessary, to see that funds were invested, appoint guardians or bind the minors out as apprentices, and upon a settlement of an account to require a proper discharge for the accountant, "and if any person or persons, being duly summoned to appear in any of the said orphans' courts, ten days before the time appointed for their appearance, shall make default, the justices may send their attachments for contempts, and may force obedience to their warrants, sentences and orders concerning any matter or thing cognizable in the same courts, by imprisonment of body, or sequestration of lands or goods, as fully as any court of equity may or can do. Provided always, That if any person or persons shall be aggrieved with any definitive sentence or judgment of the said orphans' court, it shall be lawful for them to appeal from the same to the supreme court; which appeal, upon security given, as is usual in such cases, shall be granted accordingly."

This act, with some amendments, remained in force until supplied in 1832 by the act drafted by commis-

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¹ III Statutes at Large, 14.

sioners to revise the civil code. We have already seen that an act of September 29, 1759,¹ which failed of approval by the Crown, appointed the judges of the common pleas to hold the orphans' court. This, however, was a matter of form rather than substance, for the judges of the common pleas were selected from the general commission of the peace and none, at this period, was learned in the law. The dockets of the orphans' court of Philadelphia County, which are complete from 1719, show a long list of worthy citizens presiding in this tribunal. The court did not have any special president but certain justices of the peace to whom the service was congenial usually attended its sessions. John Hill Martin notes² that whenever the mayor of the city was present he always presided, and on all other occasions the order of seniority of justices was rigidly observed, erasures being made in the minutes to correct errors in this respect.

The oldest docket in the Philadelphia office opens the ninth of April, 1719, with the following justices present: Jonathan Dickinson, Robert Assheton and Clement Plumstead. The first case is a petition for the appointment of a guardian and these cases are the most numerous in the early records.

There are also many petitions for the sale of land for the payment of debts or to support minors, to partition real estate, to compel the filing of accounts and for the appointment of auditors. At the court held February 12, 1738, there is a petition by the widow and executrix of Abel Cain for leave to sell "a negro woman Mumbo and her increase" for the support of the testator's children. The return shows that forty pounds was realized at the sale, of which, fifteen pounds was directed to be paid to the widow, to reimburse her for expenditures

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¹ V Statutes at Large, 462.

² Martin's Bench and Bar of Philadelphia, 66.

made, fifteen pounds to be expended in purchasing clothing for the son and putting him out as an apprentice, and the balance was directed to remain in court until further order.¹

The proceedings are usually by petition and answer and the judgment of the court is entered in the form of an order. In 1738 a subpoena was issued to an executor to appear and exhibit his account, and on his failure to do so an attachment was awarded.² But ten years later the citation is in use. Thus, on June 20, 1748, on petition by the guardian of a minor and heir at law of a decedent averring that the widow and administratrix had married again and was wasting the estate, a citation was directed to the administratrix and her husband, requiring them to appear and render an account, returnable the tenth day of July next.³

The most important audit of these early days was that of the accounts of the trustees for the sale of the lands of the Society of Free Traders, which by an Act of Assembly of March 2, 1722-3,⁴ was referred to this court, which was also directed to hear and pass upon all claims for a share in the funds. This society, an association in the nature of a joint stock company, which had purchased twenty thousand acres of land from Penn in 1681, had not proved a success, its affairs had been neglected and at the instance of the certificate holders and their heirs the act was passed under which its business was wound up. The court first met for this audit on March 10, 1724, and the meetings continued at intervals for a number of years.

It is now, of course, well settled that the orphans' court while a court of equity with respect to subjects

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¹ Orphans' Court Docket No. 2, page 78.

² Orphans' Court Docket No. 2, pages 59, 93.

³ Orphans' Court Docket No. 3, page 53.

⁴ III Statutes at Large, 345.

within its jurisdiction, has no general chancery powers, but only such as are derived from statute or are necessary to make its statutory powers effective.¹ In 1745 there is recorded a curious effort to extend its jurisdiction. William Good, by his guardian, Ralph Assheton, filed a petition averring that petitioner was the owner of ten acres of land in the township of Passyunk which had "by the extraordinary rise of the price of lands thereabouts become of considerable value;" that one Joseph Scull, brickmaker, taking advantage of the fact that petitioner was a minor, had entered on said land, dug pits and was about to set up a brick yard to the damage of petitioner, pretending that he had a lease from petitioner's father, although that lease had expired and contained no clause permitting him to commit waste, and praying that the said Scull might be cited to appear and answer the complaint and, if the facts prove true, then that Scull be restrained from committing waste or that petitioner have such other relief "as is agreeable to equity and good conscience." Whereupon it was ordered that the said Joseph Scull be served with a copy of the petition and cited to appear and answer the same.² The answer filed July 29, 1745, averred that any demand William Good might have had against the respondent for waste, damages or otherwise was not cognizable in this court, but in the courts of common law duly constituted and settled in said province, and further that the tract referred to did not belong to petitioner but to his mother, who had leased it to respondent, and that the present right and title to the same was not to be impeached, tried and determined in this court but in the ordinary course of law.

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¹ *Brinker v. Brinker*, 7 Pennsylvania Reports, 53 (1847); *Steffy's Appeal*, 76 Pennsylvania Reports, 94 (1874); *Kidder's Estate*, 1 Kulp's Reports, 412 (1875).

² Orphans' Court Docket No. 2, page 176.

There is no entry of a decree, and perhaps the answer was regarded by the parties as conclusive, inasmuch as a question of title was raised. After the closing of the governor's court of chancery there was no court with jurisdiction to enjoin the commission of waste, and the attempt to persuade the orphans to exercise that power indicates the need of such a remedy, at least to the mind of the guardian, who was himself a justice, and to that of the presiding judge, William Allen, afterwards chief justice of the province.¹

The constitution of 1776 provided that the orphans' court should be held quarterly in each city and county, while the Act of January 28, 1777,² passed for the purpose of putting into effect so much of the provincial law as was necessary in the commonwealth, conferred upon these courts the powers and jurisdiction which they had theretofore exercised. By the Act of March 14, 1777,³ registers of wills were directed to be appointed for each county by the general assembly and the office of register general was abolished. The constitution of 1790 vested the appointment of registers in the governor, but the office was made elective by the amended constitution of 1838.⁴

By the constitution of 1790⁵ it was provided that the judges of the court of common pleas of each county,

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¹ By the Act of May 19, 1874, P. L. 206, § 7, the orphans' court has power to prevent by order, in the nature of an injunction, acts contrary to law or equity prejudicial to the property over which they have jurisdiction. See Pepper and Lewis's Digest of Decisions, Vol. 15, col. 24472.

² IX Statutes at Large, 29; 1 Smith's Laws of Pennsylvania, 429.

³ IX Statutes at Large, 68; 1 Smith's Laws of Pennsylvania, 443.

⁴ Article V, § 11, Constitution of 1790; Article VI, § 3, Constitution of 1838.

⁵ Article V, § 7, Constitution of 1790; 3 Smith's Laws of Pennsylvania, page xxxix.

any two of whom should be a quorum, should compose the orphans' court thereof, and the register of wills together with the said judges or any two of them should compose the register's court. By the Act of April 13, 1791,¹ the courts were established in conformity with the constitution.

The orphans' court, although called a court of record in the Act of 1713, was not, at first, accorded that dignity. In 1786 it was held that the settlement of an executor's account was not conclusive² and this decision was followed in 1818.³ In other cases there was shown a tendency to discredit proceedings before these tribunals which, perhaps on this very account, had become loose and irregular. Judge Duncan in *McPherson v. Cunliff*⁴ gives a melancholy picture of the careless practice; the orders written on loose scraps of paper and deposited in untitled pigeon holes, or packed up as useless lumber in old trunks. Nevertheless, his opinion in that case, vindicating the authority of decrees of orphans' courts, checked their decline, while his criticism, added to complaints from the bench and bar, moved the legislature in the resolution for the revision of the civil code passed March 23, 1830, to require the commissioners "to revise the several statutes relative to the settlement of accounts before registers and proceedings in the orphans' courts, as soon as conveniently may be, and report the same for the determination of the general assembly at their next session." Accordingly the commissioners made their first report to the legislature on January 31, 1831, and

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¹ 3 Smith's Laws of Pennsylvania, 28.

² *Marriot v. Davey*, 1 Dallas's Report, 164 (1786).

³ *Kohr v. Fedderhaff*, 4 Sergeant & Rawle's Reports, 248 (1818).

⁴ 11 Sergeant & Rawle's Reports, 422 (1824). So far as Philadelphia County is concerned the orphans' court records are in a better state of preservation than those of the other courts.

presented two bills, one relating to registers and registers' courts and the other relating to orphans' courts. Upon the latter bill the commissioners observed:—

“The bill relating to the Orphans' Court has occupied a large share of our time and reflections. The peculiar structure of that court, its extensive but ill-defined sphere of jurisdiction, the magnitude of the interest upon which it operates, the uncertainty of the code of law by which it is regulated, and its equally uncertain and insufficient practice and process, serve to surround with difficulties every attempt to frame a regular system for it: So convinced are we of the arduousness of the task of compiling a complete system, which shall embrace the constitution, jurisdiction, powers, and practice, of this court, that had it not been for the express directions of the legislature to report upon it at the present session, we should probably have reserved this subject to the last, and given it the utmost deliberation that our limits allowed. Of the necessity however of an early as well as thorough examination and revision of the acts of assembly relating to this tribunal, we are fully convinced.”¹

The bills recommended by the commissioners were enacted into laws at the session of 1832, that relating to registers and registers' courts being approved March 15, 1832,² and that relating to orphans' courts on March 29, 1832.³

Under these acts the register was given jurisdiction within the county for which he was appointed, “of the probate of wills and testaments, of the granting of letters testamentary, and of administration, of the passing and filing of the accounts of executors, administrators and guardians, and of any other matter whereof jurisdiction may be at any time expressly annexed to his office.”

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¹ First Report of the Commissioners to Revise the Civil Code (1831).

² P. L. 135.

³ P. L. 190.

When a caveat was filed, objection made to the granting of letters of administration, or when any disputable or difficult matter came into controversy, the register, at the request of any person interested, was required to call a register's court for the decision thereof. So also, an appeal might be taken to the register's court from all the judicial acts and decisions of the register. The register's court comprised the register of wills and the judges of the court of common pleas of the county or any two of said judges.

After the register had allowed and filed any account in his office, he was required to prepare and present a certified copy thereof to the orphans' court at its next stated meeting and give notice by public advertisement that said accounts would be presented to the orphans' court for confirmation.

The judges of the court of common pleas of each county or any two of them composed the orphans' court, which was declared a court of record, the decrees of which were not to be reversed or avoided collaterally in any other court. The jurisdiction of the court was summarized in the act as follows:—

"The jurisdiction of the several Orphans' Courts of this Commonwealth shall extend to and embrace the appointment, control, removal and discharge of guardians, the settlement of their accounts, the removal and discharge of executors and administrators deriving their authority from the register of the respective county, the settlement of the accounts of such executors and administrators and the distribution of the assets or surplusage of the estates of decedents, after such settlements among creditors or others interested in the sale or partition of the real estate of decedents among the heirs, and generally to all cases within their respective counties, wherein executors, administrators, guardians or trustees are or may be possessed of or undertake the care and management of, or are in any way accountable for any real or personal estate of a decedent, and such jurisdiction shall be exercised in the manner hereinafter provided."¹

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¹ Section 4 of the Act of March 29, 1832, P. L. 190.

No account of an executor, administrator or guardian was to be confirmed and allowed by the court unless advertised by the register of wills as provided in the prior act and all accounts, except partial accounts by guardians, were to be examined by the court or referred to auditors, unless otherwise agreed by all parties in interest.¹ These provisions were adopted to compel a more thorough audit of accounts. Under the prior practice the settlement of accounts in the register's office was generally a perfunctory matter and no more than a mere vouching of the items of the account, while the confirmation in the orphans' court was largely a matter of form. A reform in these matters was absolutely necessary if the decrees of the orphans' court were to be made conclusive. Finally the practice and process of the orphans' court were defined and strengthened. Writing in 1847, Mr. Hood observed:—

“The orphans' court, as at present constituted, is a court of a peculiar nature both as respects its jurisdiction, powers, and the forms of its proceedings, partaking of the characters of a court of common law, a court of equity, and an ecclesiastical court. The process of the orphans' court would seem, in some respects, to resemble that of the English ecclesiastical courts, whose proceedings are regulated according to the practice of the civil and canon law; or rather according to a mixture of both collected and new-modelled by their own particular usages and the interpretation of the courts of common law. It was this establishment of the civil law process in the ecclesiastical courts that made a coalition impracticable between them and the national tribunals of England. The act of 1832 has remodelled the forms of proceeding in the orphans' court, making them approximate more nearly to the common law. Hence, in the orphans' court practice, are found the *motion*, *rule*, *fieri facias*, and *subpœna* of the common law courts, the *petition* of chancery, and the *citation* of doctors commons; and mingled with them, the *order*, *decree*, and *sequestration* derived through these equity and ecclesiastical tribunals, from the civil and canon laws. In one respect the orphans' court may be said to be of a higher nature than the court of chancery and the ecclesiastical courts of

England: for the court of chancery, when proceeding by subpœna, is not a court of record, nor are the ecclesiastical tribunals, courts of record."¹

Under the Act of 1832, and some additional acts relating to decedents' estates subsequently passed on the recommendation of the commissioners, the orphans' courts reached their full dignity as courts of record and have justified their creation by a long career of usefulness. The confidence of the community has been further marked by the extension of their jurisdiction in numerous cases as, for example, under the Price Act.² To fully describe the powers of the court would exceed the limits of this chapter and indeed open up the whole subject of orphans' court practice, a matter that has been thoroughly discussed in several text books.³ It is necessary, however, to refer to certain changes brought about by the constitution of 1874 which abolished the register's court and conferred its jurisdiction on the orphans' court, provided for the establishment of separate orphans' courts in counties having a population exceeding one hundred and fifty thousand, and directed that all accounts filed with the register of wills, as clerk of a separate orphans' court, should be audited by the court without expense to the parties, unless the parties themselves nominated an auditor.⁴

These changes have proved most beneficial. The registers' court was unnecessary and was wisely abolished, while the creation of separate orphans' courts in the larger communities has been particularly advantageous in furnishing to the judiciary of the state a corps of

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¹ Hood on Executors, 103.

² Act of April 18, 1853, P. L. 503.

³ Scott on the Intestate System of Pennsylvania, Rhone's Orphans' Court Practice, Brewster's Orphans' Court Practice, Pepper and Lewis's Digest of Decisions, Vol. 14, col. 24234.

⁴ Article V, § 22, Constitution of 1874; see appendix.

experts, specially trained in the handling of those difficult and intricate problems arising out of the devolution of property by death. The name of the court today indicates but a small part of its functions, but is an historic illustration of the way in which great institutions sometimes grow from small beginnings.

CHAPTER VI.

In tracing the early history of the judicial proceedings by which roads and streets are laid out and opened in Pennsylvania, the common law of England lends little assistance. The physical conditions in colony and mother country were so radically different as to afford little analogy in matters of local or municipal regulation. In England, at the time of the settlement of the province, the country was traversed in every direction, from town to town and village to village, by ways so well defined by custom and so well established by reputation, that a complaint of want of thoroughfare was uncommon.¹ In Pennsylvania, as in the other colonies, the opening of roads for public travel and for the transportation of commodities was an immediate and pressing economic necessity.

The science of road construction was still in its infancy and throughout England roads were, during the seventeenth and eighteenth centuries, in a deplorable condition. In the first year of the reign of Queen Anne, Charles III of Spain visited England. His experiences on the road between Portsmouth and Petworth in Sussex are thus related by one of his suite:—

“We set out at six in the morning by torchlight to go to Petworth and did not get out of the coaches (save only when we were overturned or stuck fast in the mire) till we arrived at our journey’s end. ’Twas a hard service for the Prince to sit fourteen hours in the coach that day without eating anything, and passing through the worst ways I ever saw in my life. We were thrown but once, indeed, in going, but our coach (which was the leading one) and his Highness’s body coach would have suffered very much if the nimble boors of Sussex had not frequently poised it or supported it with their shoulders from

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¹ Woolwych on Ways, 6.

Godalming almost to Petworth; and the nearer we approached the Duke of Somerset's house the more inaccessible it seemed to be. The last nine miles of the way cost us six hours to conquer them: and indeed we had never done it if our good master had not several times lent us a pair of horses out of his own coaching, whereby we were enabled to trace out the road for him."¹

So Defoe, in a letter written in 1722, remarks:—

"Going to church at a country village not far from Lewes, I saw an ancient lady—and a lady of very good quality I assure you—drawn in her coach to church with six oxen; nor was it done in frolic or humour, but mere necessity, the way being so stiff and deep that no horses could go in it."²

Few roads were more than bridle paths and a journey for any distance from home was a serious undertaking, that commonly meant the inditing of a last will and testament and the settlement of one's worldly affairs. A country gentleman when traveling alone at this time usually adopted the plan called riding post; that is, he hired at each stage two horses and a postboy, who carried the portmanteau behind him and rode back when fresh horses were required.

With the physical conditions thus, it is not surprising that the road law of the country was that of the feudal period, except as affected by special turnpike acts. Three kinds of ways were recognized—footways, horseways and cartways. In the language of Coke:—

"There be three kinds of wayes whereof you shall reade in our ancient bookes. First a footway, which is called *iter*, *quod est jus eundi vel ambulandi hominis*; and this is the first way. The second is a footway and horseway, which is called *actus ab agendo*; and this vulgarly is called *packe* and *prime way* because it is both a footway, which was the first or prime way and a *packe* or *drift way* also. The third is *via* or *aditus* which contains the other two and also a cartway etc. for this is *jus*

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¹ England in the Eighteenth Century, Sidney, Vol. II, 3.

² England in the Eighteenth Century, Sidney, Vol. II, 6.

eundi, vehendi et vehiculum et jumentum ducendi: and this is two fold, viz: regia via, the king's highway for all men, et communis strata, belonging to a city or town or between neighbors and neighbors. This is called in our bookes chimin, being a French word for a way, whereof cometh chiminage, chiminagium or chimmagium, which signifieth a toll due by custome for having a way through a forest, and in ancient records it is sometimes called pedagium."¹

Another classification divided ways into: King's highways, that is, public passages for the king and his subjects; common ways or such as led from a village to the parish church or common fields, and were for the benefit of the particular inhabitants of the locality; and private ways, where particular individuals had a right of passage through certain land.

The right to a public highway usually rested on an act of parliament, express grant, dedication, or was claimed by prescription, and, as already stated, complaints of want of thoroughfare seldom arose. If it became necessary to deviate from an existing way the new route did not become a public highway without a writ of *ad quod damnum* and inquisition. This was an ancient writ issued out of and returnable into chancery through the petty-bag office and was directed to the escheator or sheriff, who was commanded to hold an inquisition to determine what damage would result to the king or his subjects from the grant so that compensation could be made a condition thereof.² Without this writ the public could not justify going over a new way, as a common highway, but were obliged to show their excuse specially.³ If the purpose was to change an old way or alter its condition, the new way, or way so altered, was required to be as beneficial as the old

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¹ Coke on Littleton, 56 A.

² Fitzherbert's *Natura Brevium*, 226.

³ *King v. Warde*, Croke's Reports (Charles I), 226 (1633).

one.¹ "These inquests of office," says Blackstone, speaking generally of sheriffs' and coroners' inquisitions, "were devised by law, as an authentic means to give the king his right by solemn matter of record without which he, in general, can neither take nor part from anything. For it is of the liberties of England and greatly for the safety of the subject, that the king may not enter upon and seize any man's possession upon bare surmises without the intervention of a jury."²

The obscurity of the practice and infrequency of reported cases shows that *ad quod damnum* proceedings never played an important part in highway law. The writ contained great possibilities, and, with a simplified procedure, might have become a useful vehicle for accommodating the conflicting interests of the public and the land owner, had road matters been of importance in the flourishing days of petty-bag jurisdiction. But in those times the ancient ways were sufficient for the needs of the public, and where new roads were formally opened, they were usually either dedicated by the land owner or laid out over unimproved lands without compensation. When the pressure for highway improvements became greater a statutory proceeding more convenient and inexpensive was substituted for the ancient writ, preserving, however, the spirit and substance of the earlier procedure.³ In some of the American states, notably in Virginia and Kentucky, the writ *ad quod damnum* was introduced and applied in proceedings for the erection of mill dams on streams, and

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¹ *Ex parte Armitage*, Ambler's Reports, 294 (1755).

² III Blackstone's Commentaries, 259; *Bonaparte v. Camden and Atlantic Railroad Co.*, Baldwin's Reports (U. S.), 205 (1830) at page 221.

³ 13 George III, chapter 78, § 19; *Davison v. Gill*, 1 East's Reports, 64 (1800).

extended to other matters involving injury to and appropriation of private property.¹

It was about the time of the settlement of the colonies that eminent domain as a distinct branch of governmental power began to be discussed, although it had long existed as a necessary attribute of sovereignty. Grotius, in 1625, first used and apparently originated the phrase which, although open to criticism, in so far as it implies that the basis of the power is an ultimate ownership in the state of all property, has been universally adopted as defining the power inherent in a sovereign state to take or authorize the taking of private property for public use.² But in the seventeenth and eighteenth centuries the practical application of the principle and its relation to the constitutional restraints on state action had not been worked out.³

The period of Dutch supremacy was not marked by any special activity in road improvements. The colonists on both the North and South Rivers were scattered in villages along the banks and transportation was usually by water. The laying out of such highways as were needed came under the jurisdiction of the schout and schepens, while the streets of the capital were under the immediate supervision of the chief officials.⁴ Thus an ordinance of the director and council of New Amsterdam of February 25, 1656, approves a survey of

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¹ *Wroe v. Harris*, 2 Washington's Reports (Va.), 126 (1795); *Gay v. Caldwell*, Hardin's Reports (Ky.), 63, (1806); *Mairs v. Gallahue*, 9 Grattan's Reports (Va.), 94 (1852); *Tracy v. Elizabethtown, L. & B. S. Railroad Co.*, 78 Kentucky Reports, 309 (1880); *Schuylkill & S. N. Co. v. Decker*, 2 Watt's Reports, 343, (1834).

² Grotius, *De Jure Belli et Pacis*, Lib. III, chapter 20, § 7.

³ Nicholls on Eminent Domain, 7.

⁴ II New York Colonial Documents, 621; O'Callaghan's *Laws and Ordinances of New Netherlands*, 478.

the streets of the city and refers the execution to the burgomasters, who are to give notice to all persons, who may be damaged by the survey, to furnish a statement of their damages, and if an agreement cannot be reached, the matter is to be referred to two or three disinterested persons who are to appraise the lots.¹ Various regulations were adopted as to the use of the village streets, one of which may be quoted at length:—

“Ordinance of the Vice Director and Commisaries of Fort Orange Passed 10 December 1659. The Worshipful Commissary and Commissioners of Fort Orange and Village of Beverswyck, having heard divers complaints from the Burghers of this place, against playing at Golf along the streets, which causes great damage to the windows of the Houses, and exposes people to danger of being wounded, and is contrary to the freedom of the public streets; therefore their worships, wishing to prevent the same, forbid all persons playing Golf in the streets, on pain of forfeiting fl. 25 for each person who shall be found doing so.”²

That some of the good people of Albany were devoting their time to golf at this period, is more surprising than that their fellow-townsmen objected to the use of the streets as links.

Upon the conquest of the New Netherlands by the English the matter of highway regulation seems to have been neglected. There is no mention of the subject in the Duke of York's Laws, and this is the more surprising in view of the fact that they were drawn largely from New England sources where the subject of highways had received early attention. By a law of the colony of Massachusetts passed in 1639 highways were to be laid out on complaint to the county court, which was directed to appoint “two or three men of each next town whose

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¹ O'Callaghan's Laws and Ordinances of New Netherlands, 219.

² O'Callaghan's Laws and Ordinances of New Netherlands, 367.

inhabitants had most occasion thereof," and these, upon view, were to lay out such highway according to order and make return to the next court, compensation to be paid to any man damaged in his improved ground by estimation of those who laid out the same. If the viewers disagreed or the person was dissatisfied with the acts of the viewers, the matter was to be referred to the county court,¹—a simple and effective proceeding, and hard to improve upon, as long as the laying out of roads was regarded as a matter of local government.

In the settlements on the Delaware the opening and repair of roads were matters within the jurisdiction of the court of sessions. Overseers of highways were appointed who were empowered to call upon the inhabitants for assistance in the construction and repair of highways and bridges, and persons refusing to work on the roads were fined by the courts.² The following entry appears on the minutes of the court held at New Castle June 15, 1678:—

"It being Represented to the court yt there is need of a highway to come from Jan Staalcoops Round Christina to this Towne of New Castle, The court therefore ordered, that all the Inhabitants dwelling on the North syde of Christina, from brandewyn Creeke to the place or plantation of John Ogle, Doe with all Convenient speede make and Cleare a good and passable Highway from ye^sd Staalcoops house Round Christina Creeke to this Towne of New Castle, and doe appoint for overseer thereof Mr. Abraham Man who is desired to see the worke Effectually done."³

At a court held December 3, 1679, the inhabitants were divided into companies under designated overseers

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¹ Laws of Massachusetts Colony (1672), 64; compare Laws of Colony of New Plymouth (Edition of 1836), 64.

² Records of Court at Upland, 118, 192.

³ Records of the Court of New Castle, 288.

and charged with the care of the highways in their respective districts. It was also ordered that—

“Whereas for ye Common Good of the Country itt is found necessary that ye highwayes from place to place bee annually made good & cleared Itt is therefore resolved viz^t That Every respective overseer take care that betweene Every decem & March his part of ye highway bee made good & cleared, upon ye penalty & forfeiture of 1000 lb. of tobbs if proved to be ye fault of ye overzeer and if any Inhabitant resorting under the company of any overseer shall refuse upon due notice to worke att ye highway till it be finisht hee to forfeit for Each such neglect 400 lb. of tobacco. The highway to be Cleared as followeth viz^t The way to bee made cleare of standing & Lying trees at Least 10 foot broad all stumpes & shrubs to bee close cutt by ye ground, the trees markt yearly on boath sydes, sufficient bridges to be made and kept over all marshy swampy & difficult dirty places & what ever else shall be tougt more necessary in and about ye highwayes aforesd.¹”

William Penn on receiving his grant of the province of Pennsylvania, provided in his frame of government that the governor and provincial council should “at all times settle and order the situation of all cities, ports and market towns in every county, modeling therein all public buildings, streets and market places,” and should “appoint all necessary roads and highways in the province.”²

In the instrument executed by Penn July 11, 1681, known as “the conditions and concessions to the adventurers and purchasers,” it was agreed that—

“Great roads from City to City not to contain less than forty feet in breadth shall be first laid out and declared to be for highways before the Dividend of acres be laid out for the purchaser and the like observation to be had for the streets in the towns and Cities that there may be convenient roads

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¹ Records of the Court of New Castle, 364, also pages 143, 169, 197.

² Charter and Laws of Pennsylvania, 95.

and streets preserved not to be encroached upon by any planter or builder that none may build irregularly to the damage of another."¹

"On the arrival of the adventurers in this country," says Chief Justice Shippen, "it was found very practicable to lay out streets in one great city, which was accordingly done, but quite impracticable to lay out the great roads or highways from city to city, as only one city was then contemplated. But as such great roads were to be laid out over the land of the proprietor alone and the purchasers were not to contribute, it was at length agreed and sanctioned in lieu of the impracticable plan settled in England, there should be an additional quantity of land granted to each purchaser without price or rent, to enable him to contribute without loss to such public roads as should thereafter be found necessary for the use of the inhabitants."² The quantity of six per cent was fixed as the permanent additional allowance for that purpose and provision was made therefor in the Acts of November 20, 1700,³ and of June 7, 1712.⁴ Both of these acts were repealed by the queen in council, for reasons having nothing to do with this provision, but the custom was established, and it is the law of this state that the owner of land taken for the purpose of a public road, has no right to compensation for the land itself, but only for the improvements, unless such a right is expressly conferred by statute.⁵ "The six per cent," in the words of Chief Justice Black, "belongs to the State and she may con-

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¹ Charter and Laws of Pennsylvania, 467.

² *McClenachan v. Curwen*, 6 Binney's Reports, 509; 3 Yeates's Reports, 362 (1802).

³ II Statutes at Large, 118.

⁴ II Statutes at Large, 400.

⁵ *Pepper and Lewis's Digest of Decisions*, Vol. 18, col. 13567.

stitutionally appropriate it to the use it was meant for. I speak now of land in its natural state. Where buildings are pulled down, or other valuable improvements destroyed in the making of a new road, the right to compensation is guaranteed to the owner by the constitution."¹

On the eighteenth of April, 1682, Captain Thomas Holme was commissioned as surveyor general of the province and proceeded to the Delaware, where, in the summer of that year, a site for the city of Philadelphia was chosen and the ground laid out in streets and lots, according to the general directions of Penn as shown on the plan usually referred to as Holme's map of Philadelphia.² If the streets seem narrow, it must be remembered that the plan was conceived on a liberal scale for that time. When the city was laid out the standard width of a street in London was two perches or thirty-three feet. Penn determined to make the streets wider in Philadelphia, so as to prepare for future growth, and, accordingly, established the standard of fifty feet, which is about three perches. Market street was laid out one hundred feet wide, Broad street one hundred and thirteen feet, Arch or Mulberry street sixty-six feet or four perches.³

Penn, indeed, was determined that the city should not be cramped. "Let every house," he said in his instructions to the commissioners to lay out the city, "be placed, if the person pleases, in the middle of its plat as to the breadth way of it, that so there may be ground on each side for gardens and orchards, or fields,

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¹ *Perryville & Z. P. R. Co. v. Thomas*, 20 Pennsylvania Reports 91 (1852).

² Hazard's Annals of Pennsylvania, 555.

³ *Philadelphia v. Hinckley*, 9 Pennsylvania District Reports 125 (1900).

that it may be a green country town, which will never be burnt, and always be wholesome.”¹

In the charter of October 25, 1701,² erecting the town into a city, Penn ordained that the streets of the city should forever continue as they were then laid out and regulated, and no special power was conferred upon the corporation to alter the plan. This, of course, applied to the old city, extending from Vine street on the north to Cedar (South) street on the south. The streets in the several outlying districts were, upon their incorporation, plotted under special acts.

In accordance with the Frame of Government, the provincial council assumed jurisdiction of the laying out of the main highways, and the minutes of that body are full of references to such matters. At a meeting of the council in 1686—

“A Petition Relating to highways was Read, upon wch the Councill agreed yt there should be a Sett time appointed for y^e Councill to Inspect all y^e Business relating to y^e Highways, and to Order yt y^e Roads be Laid out in y^e most proper and Convenient Places within this Province.”³

The multiplicity of their duties, however, prevented them from taking entire charge of road cases, and by the Act of March 1, 1683,⁴ it was provided that each county court should “appoint and settle sufficient cart-ways to the most convenient landing places, in their respective counties, for public use and benefit.” A distinction was thus made between the great provincial roads or king’s highways and the local roads or cart-ways for the convenience of a special neighborhood. This is illustrated by two resolutions of the council,

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¹ Hazard’s Annals of Pennsylvania, 530.

² 1 Dallas’s Laws of Pennsylvania, Appendix 11.

³ I Colonial Records, 136, 18, 3 mo. 1686.

⁴ Charter and Laws of Pennsylvania, 139.

passed within a couple of months of each other. In one case the minutes read:—

“The Petition of Henry Jones was Read, setting forth y^e badness of the way from Moyamensin to Philadelphia. It was Referred to y^e County Court, who it's presumed has power to appoynt Roads to Landing Places, to Court, & to Markett.”¹

In the other case:—

“The Councill taking into Consideration y^e Unevenesse of y^e Road from Philadelphia to y^e falls of Delaware.

“Agreed that Robt Turner & John Barnes for y^e County of Philadelphia, Arth. Cook and Tho. Janney for y^e County of Bucks, with y^e Respective Surveyrs of y^e sd Counties, meet and Lay out a more Comodious Road from y^e broad Street in Philadelphia to y^e falls aforesaid: y^e time when is Referred to y^e members Nominated.”²

From this time on the minutes of the council contain many references to public highways. Petitions were presented, sometimes by individuals, sometimes by the inhabitants of a neighborhood or township, complaining of the want of a road and praying for an order to lay out the same; if the petition was approved, the usual practice was to order that a warrant be directed to the surveyor general to lay out the road. The following is a typical case:—

“Upon the memorial of the Honble, Andrew Hamilton, Esqr. Gor of the Jersies, & post master generall, &c. to the Gor & Council, Setting forth that it was formerlie with great difficultie that the post could goe to philadelphia by Land, to the great inconvenience of Correspondence & trade, and yt for remedie whereof, & accomodaon of Travellers, a ferry had been erected on Jersie side att a great chaarge, but that the way was not yet returned from the landing on pennsylvania side to the king's road, wch is about three Quarters of a mile & easily cleared; And therefore, Requesting the Governor & Council to approve the said road, and give the necessarie orders for clearing it.

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¹ I Colonial Records, 142, 3, 7 mo. 1686.

² I Colonial Records, 148, 19, 9 mo. 1686.

"Ordered, that a warrantt be directed from the Governor to Thomas flairman, Surveyor, To lay outt the king's road from dunck William's Landing, (the nearest & most convenient yt may be had, & Least prejudicial to the Lands and improvments of the neighbourhood,) Into the king's great road that Leads to philadelphia, and that a Return in words, of the Courses & protracted figure thereof, be made Into the Secries office, in order to be filed & recorded there, as a finall Confirmaon thereof. And that the Justices of the peace for the County of Bucks, be by the Governor requested to order the overseers of ye Highways in that County to make good & clear the same wt all expedition."¹

The return of the surveyor general is as follows:—

"By virtue of the Governor's speciall warrant, bearing date ye 28th day of October, 1696, to mee directed, psuant to an order of the Govornor & Council, granted upon the applicaon of Andrew Hamilton, esqr. Governor of ye Jersies & post mr generall, I have surveyed & Laid outt the king's roade from ye Landing of duncken Williams, on delaware, in the Countie of Bucks & province of pennsilvania, Beginning there at a spanish oak att High water mark; thence sixtie foot broad, extending North North-west on each side the Line, dividing betwixt the Land of the sd duncken Williams & Nathaniel Harding, Two Hundred pearches; Thence in the sd duncken's Land, north eightie-One degrees, westerlie fourtie pearches; Thence north sixtie-four degrees, westerly sixty-two pearches, Unto the old king's Roade which Leads to philadelphia, & Hath been ancientlie Surveyed & Returned."²

Occasionally an order for the laying out of a road is directed to a number of individuals, usually six, but these roads are not always described as king's roads, and would seem sometimes to belong to the class of roads ordinarily laid out by the courts, which the council, in a few instances, undertook to order, in the exercise of their supervisory functions still undefined. In fact there are instances where their order was for the con-

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¹ I Colonial Records, 463, October 28, 1696.

² I Colonial Records, 467, October 31, 1696.

firmation of an old road merely, or to settle a disagreement between the parties interested and the viewers appointed by the county court.

An interesting case was that of Robert Wade, the owner of a tract of land in Chester, the whole of which was taken by the grand jury for a public landing place and open street, without Wade's knowledge or consent and without offering him any compensation. Upon his protesting the justices stated that they "Seazed it for the king," whereupon he petitioned the council, stating—

"That the petitionr being a freeman, cannot by Law be disseized of his freehold but by the Judgment of his 12 equalls, by a Legall tryall, and which act of the Court has been to the petitioner's great Loss & damage, who is daylie threatened to have what hee shall build on sd his Land pulled downe and thrown in the sd creek, and therfor, requesting such remedie & redress in the premisses as is agreeable to Justice & equitie."¹

The council sent to the court for a copy of the proceedings, and on further debate it was resolved that the action of the grand jury was unjustified and an order made that the petitioner be no further molested in the peaceable possession of his property.²

This isolated attempt by the grand jury to assume the right of eminent domain having been promptly frustrated, the real doubt as to how the Act of 1683 was to be interpreted was resolved by a further act defining the practice in road cases, passed May 10, 1699.³ This was re-enacted in almost the same language in the Act of November 27, 1700,⁴ as follows, the only substantial additions being the clauses bracketed:—

"Section I. Be it enacted by the Proprietary and Governor, by and with the advice and consent of the freemen of this

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¹ I Colonial Records, 402, February, 13, 1693-4.

² I Colonial Records, 441, May 25, 1695.

³ Charter and Laws of Pennsylvania, 285.

⁴ II Statutes at Large, 68.

Province and Territories in General Assembly met, and by the authority of the same, That all the King's highways or public roads within this province or counties annexed, shall be laid out by order of the governor and council for the time being; which roads shall be recorded in the council book, with the courses thereof, as near as may be done.

"Section II. And be it further enacted by the authority aforesaid, That the justices of each county court within this government shall, and by virtue of this act have power, as often as they find needful, in open court to order and appoint six sufficient housekeepers of the neighborhood inhabiting near the place where complaint is made for want of a road or cartway unto the public road, who shall view the said place; and if the said housekeepers, or any four of them, are satisfied that there is occasion for a road or cartway to be laid out, according to the complainant's or complainants' desire, then they shall and may lay out the same, [in and through such convenient places as they shall think may be least to the damage or inconvenience of the neighbors or parties concerned, and least injurious to the settlements thereabouts;] and of such breadth as the justices shall order and appoint, so that it exceed not fifty feet; and shall make return thereof under their hands to the next county court after it is laid out; and if then and there the justices approve the same, it shall at the same court be entered upon record, and from thenceforth be taken, deemed and allowed to be a lawful road or cartway from that time forwards.

"[Provided, That no such road shall be carried through any man's improved lands but where there is a necessity for the same; and where that appears, the respective county courts shall appoint six indifferent men to view and adjudge the value of so much of such improved lands as shall be taken up for the use aforesaid, and the value thereof shall be paid to the owner of the said land out of the respective county stock.]

"And to prevent any difference that may arise among neighbors about roads or cartways laid out by order of the governor and council, or any of the county courts in this government, and which are or shall be entered upon record, either before or after the making and publishing of this act:

"Section III. Be it enacted by the authority aforesaid, That all such roads and cartways as before mentioned, shall be taken, deemed and allowed to be free, open and lawful roads and cartways from the time they are so laid out and recorded as aforesaid."

This act was the real foundation of the system of laying out and opening township roads in Pennsylvania. Its salient features were the provision for the appointment of six viewers to report on the necessity for the road before confirmation by the court, and the further provision that, where it became necessary to carry the road through improved lands, six viewers should be appointed to adjudge the value of the improvements so taken, which was to be paid for out of the county stock.

By a supplementary act of February 20, 1735,¹ the justices of the quarter sessions were empowered, on the application of any person for a road from the plantation or dwelling place of such person to or from a highway, to direct a view, and if such road be found necessary, to order it laid out, not exceeding thirty-three feet in width, the value of the improved land taken to be paid for by the person at whose request it was laid out, who was also to clear and maintain the same.

The result of this legislation was to establish three kinds of roads: (1) The great provincial roads or king's highways, laid out by order of the provincial council; (2) Cartways leading into public roads, laid out by order of the justices of the county courts upon the report of viewers, and (3) Private roads, likewise laid out by order of the justices upon the report of viewers.² The last were common roads for the use not only of the persons for whom they were laid out but for all who should have occasion to travel to the plantations of such persons. Some interesting information as to the procedure may be gleaned from the minutes of the council, where road matters were frequently under consideration. Thus, on October 7, 1737, on consideration of a petition of

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¹ IV Statutes at Large, 296.

² *McClenachan v. Curwen*, 6 Binney's Reports, 509; s. c. 3 Yeates's Reports 362 (1802).

sundry inhabitants of Lancaster County, setting forth the want of a high road from the town of Lancaster to Coventry Iron Works on French Creek in Chester County and praying for the appointment of proper persons to lay out the same, the council granted the prayer of the petition and directed that six persons appointed from Lancaster County or any four of them view and lay out a high road to the division line between Lancaster and Chester counties; that six persons appointed from Chester County, or any four of them, there join the others and agree on the most convenient passage over the division line and continue the road to the terminus and that the twelve, or eight of them, make return to the council for confirmation.¹ The duties of the viewers, it will be noticed, were limited to their respective counties.

On March 24, 1736-7, an elaborate draft of a road from Harris's Ferry on the Susquehanna River to Kennison's plantation in Chester County was returned by the viewers, eleven of whom signed the report.² A petition by some inhabitants of Chester County was presented, objecting to the road as laid out, and praying for a review. Other citizens supported the report, and after hearing the petitioners for the review withdrew their petition and the road was confirmed as laid out. Nevertheless, the parties being still dissatisfied and the quarter sessions of Chester County being of opinion that the road as laid out was impracticable, new petitions were presented to the council for and against the road. After full argument the council, finding that all the objections were to that part of the road in Chester County, appointed six persons from that county to review the road from the county line and make such alterations to

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¹ IV Colonial Records, 247, October 7, 1737.

² IV Colonial Records 181, March 24, 1736-7.

the best of their judgment "as may truly answer the intention of accommodating both Country and travellers."¹ Upon the report of the reviewers the following order was made:—

"The Board, on due Consideration had of the said Return, and of the Draught accompanying it, do approve, establish, & confirm the Road aforesaid as now laid out and reviewed, agreeable to which Return the Confirmation formerly made by an Order of Council of the twenty-fourth day of March, 1736-7, is directed to be amended, and the said Road is hereby declared to be the King's Highway or Publick Road, and It is Recommended to the Justices of the Peace for the County of Chester, that they, at their next ensuing Quarter Sessions, issue Directions to the Overseers of the Highways for causing the said Road to be opened & cleared, so that it may be rendred commodious for the Publick Service."²

The foregoing record is interesting as showing the practice of granting reviews in the case of provincial as well as county roads, and other instances will be found in the minutes of the council. In the case of a road laid out by the quarter sessions it was held in 1764 that a review, though not taken notice of in the act of assembly, had always been granted and had become a matter of right.³ By the Act of April 6, 1802,⁴ the quarter sessions were required to grant a review in all cases,

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¹ IV Colonial Records, 283, March 22, 1737-8.

² IV Colonial Records, 287, May 15, 1738.

³ *King's Road*, 1 Dallas's Reports 11 (1764). *In re Road in Chester County*, Supreme Court Docket No. 4, page 37, September Term, 1764, on *certiorari* the order is reversed "for refusing to grant a review, and reviewers appointed." Is this the same case? Lewis Gordon, writing to Richard Peters, March 18, 1758, signified his intention to apply for a review of a road, but observed that the practice was declaimed against, except where fraud appeared. VII Pennsylvania Archives (2 Series), 254.

⁴ 3 Smith's Laws of Pennsylvania, 521, § 22. See also § 25 of the act of June 13, 1836, P. L. 551.

provided the application was made at the next court after the report had been made on the first view. The appointment of re-reviewers is discretionary.

The Act of April 6, 1802, just referred to, was a general road law which replaced the older legislation with greater elaboration of detail. It, in turn, was repealed by the general road law of June 13, 1836,¹ an act, drafted by the commissioners to revise the civil code, which embodied the previous legislation and practice in a clear and comprehensive form. This act, with its amendments, is still in force and is the only general road law applicable to all parts of the commonwealth, but its operation has been greatly restricted by local and special acts.

Briefly stated the Act of 1836 provides that the court of quarter sessions, on being petitioned to grant a view for a road within the county, shall appoint six viewers (since reduced to three),² who, if they agree that there is occasion for the road, are to proceed to lay out the same so as to do least injury to improved property and also meet the desire of the petitioners. The viewers are required to report at the next term of court, annexing a draft of the road, stating the courses and distances and briefly noting the improvements and, when practicable, they are not to lay out the road at an elevation exceeding five degrees except at crossings of ravines and streams. If the court approve the report they must direct of what breadth the road shall be opened³ and at the next court the whole proceedings are to be entered of record and the road deemed and allowed to be a

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¹ P. L. 551.

² Act of May 8, 1889, P. L. 129.

³ Section 5 of the act fixed the maximum breadth of a public road at 50 feet and of a private road at 25 feet. The maximum breadth of a public road is fixed at 80 feet by the act of June 7, 1907, P. L. 452.

public road or highway or a private road as the case might be.

Public roads were to be kept in repair at the expense of the township; private roads at the expense of the petitioner. Reviews might be granted if applied for at or before the next term of court after the report on the first view. The owner of any land through which the road was laid out might, within one year from the opening, petition for the appointment of six viewers to assess his damages, who were to report to the next court the injury done, and if their report was approved the amount assessed was to be paid out of the county stock.

The Act of May 14, 1874,¹ following various prior local acts, provides that the viewers appointed to lay out the road shall endeavor to procure releases from property owners and shall assess the damages sustained, thus combining the laying out of roads and the assessment of damages in one view, and obviating the necessity of a separate view for damages, except in such counties as may have local laws inconsistent with the Act of 1874. These proceedings seem simple enough, but a glance at the hundreds of bitterly contested cases would indicate otherwise. Every step, in fact, has been the subject of protracted litigation and voluminous opinions, which must be carefully studied at every stage of this intricate game of the law.

The general road law of 1836 conferred no authority on the quarter sessions to grant a view to widen a road or street, but this jurisdiction was conferred by the Act of May 8, 1850.²

As to the vacation of roads, the Act of 1836 provided that the quarter sessions should have power, on petition, to change or vacate the whole or any part of a public or

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¹ P. L. 164, § 1.

² P. L. 713; *Church Road*, 5 Watts & Sergeant's Reports, 200 (1843).

private road which had become inconvenient, useless or burdensome, and to vacate and annul a road laid out, but not opened, on petition of a majority of the original petitioners. No authority was given to vacate a road confirmed and partly opened, but this defect was remedied by the Act of May 3, 1855,¹ which, however, expressly excepted state roads, authorized by special law, and streets in incorporated cities and boroughs. The Act of May 8, 1854,² conferred jurisdiction on the quarter sessions to vacate any private or public lane, alley, road or highway whenever the same, by reason of forming of town plots or otherwise, had become useless to the public and those having lands bounding thereon.

Whenever the whole or a part of a road is vacated, changed and supplied by a new one, the old road cannot be closed until the road laid out to supply its place is actually opened and made.³

With the dissolution of the provincial government in 1776 the jurisdiction of the council in matters relating to the laying out of highways came to an end and the constitution adopted in that year conferred no special jurisdiction in such affairs upon its successor, the supreme executive council. As a consequence, the great roads through the sparsely inhabited sections of the state, where the settlers were unwilling or unable to bear the expense of constructing such highways as the public service required, were authorized by special acts of the legislature. Such an act was that of September 21, 1785,⁴ directing the president, or in his absence the vice-president, in council to appoint three free-

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¹ P. L. 422; *Greenwich Township Road*, 11 Pennsylvania Reports, 186 (1849).

² P. L. 645.

³ *Bridgeport & N. C. T. Road*, 171 Pennsylvania Reports, 312 (1895).

⁴ 2 Dallas's Laws of Pennsylvania, 389.

holders as commissioners to view, survey and lay out a state highway from Miller's Springs in Cumberland County to Pittsburg, of the breadth of fifty feet, and to report to the president and council, who were to confirm the same or order a review. The highway, when so established, was to remain a state highway and the courses and distances to be entered in the council book. An appropriation of £2000 was made for this enterprise. This road was in part laid out, and confirmed by the council November 24, 1787,¹ as far as Bedford, but a review was ordered of the other part from Bedford to Pittsburg. By a resolution of the assembly of November 21, 1788, the council was ordered to draw for the expenses of the review, and, accordingly, by order of the council March 14, 1789,² reviewers were appointed, whose report was confirmed September 28, 1790.³

Many state roads were laid out by commissioners under similar acts and it cannot be doubted that, in the early days, such proceedings were of use where a road was desired through several counties, whose conflicting demands it was difficult to reconcile. But in later years the power of the legislature was greatly abused and the constitution of 1874 has forbidden the passage of any local or special law authorizing the laying out, opening or altering of highways.⁴

As for the local acts containing variations from the general road law, it would be useless to attempt to summarize them. A list of such acts, published in 3 Pennsylvania County Court Reports, 401, covers eight pages of small type and is really appalling. And yet this list does not include Philadelphia County, which,

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¹ 15 Colonial Records 331, November 24, 1787.

² 16 Colonial Records 26, March 14, 1789.

³ 16 Colonial Records 466, September 28, 1790.

⁴ Constitution of Pennsylvania, 1874, Article III, § 7.

prior to the consolidation in 1854, included, besides the city proper, six boroughs, ten incorporated districts and thirteen townships, many of which had their own highway systems.¹

In Philadelphia, as previously stated, the principal streets were laid down by the surveyor general on the original town plan and no special power was conferred on the corporation to change that plan. The Act of April 15, 1782,² declared that streets theretofore opened to public use by private persons or directed to be laid out by the supreme executive council should be considered and deemed public highways. The Act of March 25, 1805, empowered the quarter sessions, on petition, to grant views for the laying out and opening of streets in Philadelphia. This act was supplied and repealed by the general road law of 1836, which instituted a rather cumbersome method of summoning road viewers and was in turn repealed and supplied by the Act of March 16, 1866.³ The streets in the districts first incorporated were directed by local acts to be surveyed and laid out by the commissioners of the districts, who were required to return a general plan (in the case of Southwark, to the supreme executive council; in the case of Spring Garden, to the quarter sessions)⁴, which, on approval, was recorded. The subsequent opening of the streets, so laid out, was on petition of a stated number of freeholders to the quarter sessions. This system, with minor modifications, was extended to the other municipalities by local acts which will be found in Price's Index to Local Legislation in Pennsylvania.

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¹ Addick's Philadelphia Highway Acts.

² 2 Smith's Laws of Pennsylvania, 48, § 10.

³ P. L. 224.

⁴ Act of September 29, 1787, 2 Smith's Laws of Pennsylvania, 435; Act of March 22, 1813; 6 Smith's Laws of Pennsylvania, 37.

Section 27 of the Act of February 2, 1854,¹ by which the various municipal corporations in Philadelphia County were consolidated into one city, established a board of surveyors who, by an amendment passed in the following year,² were directed to cause a survey of the city plot to be completed. By the Act of June 6, 1871,³ the board of surveys is empowered to examine and confirm or reject all plans of survey or revision of plans made under direction of councils.

Streets in Philadelphia may be opened either by ordinance of councils or by the quarter sessions. Under the Act of April 21, 1855,⁴ councils may order any street laid down on the city plan to be opened, whenever they deem the public exigency to demand it, giving three months' notice to the owner. This act, it has been said, was intended only for special cases requiring speedy action, but, as councils are the judges as to when the exigency exists, there is no review of their decision, and, in practice, this is the usual method pursued. The quarter sessions has concurrent jurisdiction, by proceedings on petition, to order the opening of a street laid down on the city plan, but the court will not appoint viewers when the opening of the street is so inadvisable that confirmation of a report favorable to an opening would be withheld.⁵ When a plotted street is opened by ordinance, a jury of six viewers is appointed by the quarter sessions to assess the damages, and if the proceedings are begun in that court, the same viewers pass on the damages as report on the necessity for open-

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¹ P. L. 21.

² Act of April 21, 1855, P. L. 264, § 4.

³ P. L. 1353. *In re Plan* 166, 143 Pennsylvania Reports, 414 (1891).

⁴ P. L. 264, § 7, *Large v. Philadelphia*, 35 Pennsylvania Reports, 231 note (1859).

⁵ *Twenty-Eighth Street*, 102 Pennsylvania Reports, 140 (1883).

ing. The general Act of May 8, 1889,¹ providing that juries of view shall consist of three persons, does not apply to juries appointed by the quarter sessions of Philadelphia nor is the jurisdiction of that court affected by the general Act of May 16, 1891.² The juries appointed to assess damages are also to assess benefits upon the properties whose value is enhanced by the opening, which benefits are to be collected by the city as in other cases of municipal assessments.

While the matter is of academic rather than practical interest, it is curious to note that proceedings might still be brought to open streets laid down on the plans of the old incorporated districts under the special systems prevailing in those districts, it having been held as late as 1878,³ that the clause in the Act of 1813 relating to the opening of streets in the district of Spring Garden was still in force. It is highly improbable that such a proceeding could be carried to a successful issue, as these acts constitute the forgotten lore of a previous generation, and the courts are increasingly inclined to leave such matters to the municipal authorities who must devise the means of paying for public improvements.

As to changes of grade in Philadelphia, in section 27 of the consolidation act there was a proviso that compensation should be made for damage to private property resulting from any changes in the plans adopted under that section, but this was held to apply only to alterations and revisions of grades previously established by the old city or other municipalities before the consolidation. Hence, a paper change made in a grade established after the consolidation gave the land owner no right to proceed in the quarter sessions, his remedy

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¹ P. L. 129.

² P. L. 75; *Orthodox Street*, 1 Pennsylvania District Reports, 37 (1892).

³ *Parrish Street*, 12 Philadelphia Reports, 638 (1878).

being under Article XVI, § 8 of the constitution of 1874 upon the physical change. Prior to 1891 this remedy was enforceable by action of trespass. Since the passage of the Act of May 16, 1891, petitions for the assessment of damages for changes of grade are assigned to the common pleas and three viewers appointed.¹

Space will not permit a reference to many other interesting features in Philadelphia's local system and in the local systems of other parts of the state. That of Pittsburg has had an important influence on subsequent general legislation on the subject of streets in municipalities. By a series of acts, beginning with that of January 6, 1864,² authority to lay out, open and widen streets in Pittsburg was vested in councils, with very extensive powers in the matter of assessing and collecting assessments for benefits. These powers, having been exercised in an arbitrary and reckless manner, were resisted by property owners, and certain acts framed to strengthen the hands of the municipal authorities having been declared unconstitutional, the whole matter was thrown into great confusion.³ To remedy this, a series of curative acts was passed, concluding with the Act of May 16, 1891,⁴ which, while in form and intent a general act, is but a part of the series and manifestly intended as a blanket supplement to the others, to supply deficiencies and confirm doubtful powers under existing legislation. This act was held applicable to municipal corporations generally, but does not supersede previous legislation or confer new rights, such as

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¹ *In re Plan 166*, 143 Pennsylvania Reports, 414 (1891).

² P. L. 1131.

³ *Wyoming Street*, 137 Pennsylvania Reports, 494 (1891); *Pittsburg's Petition*, 138 Pennsylvania Reports, 40 (1891); *Donley v. Pittsburg*, 147 Pennsylvania Reports, 348 (1892).

⁴ P. L. 75; *Howell v. Morrisville Borough*, 212 Pennsylvania Reports, 349 (1905).

the right to damages for the vacation of a public highway which, ordinarily, does not exist unless conferred by a special law. By reason of its many practical features the Act of 1891 may in time become the basis of a uniform system.

Boroughs incorporated under the general borough Act of April 3, 1851,¹ are authorized to ordain and lay out streets within the borough limits, but in boroughs incorporated prior to the general borough act and having no special provisions on the subject in their charters, the jurisdiction to lay out streets is in the quarter sessions under the general road law. The Act of 1891 may be used in boroughs as an alternative method of proceeding.²

The counties of Erie and Bradford have under their local acts a system radically different from the general road law.³ By these acts the authority to lay out roads is vested in the road commissioners of the townships, who may be required to view a proposed route for a road on petition of twelve citizens of the township. From their action any person affected may appeal to a justice of the peace, who, if he finds there is good cause of complaint, issues a summons to six disinterested citizens as jurors, and the decision of the justice and jurors is reviewable only by *certiorari*.

Article XVI, § 8 of the constitution of 1874 secures an appeal from any preliminary assessment of damages and a trial by jury whenever private property is taken, injured or destroyed by a municipal or other corporation, or an individual invested with the privilege of tak-

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¹ P. L. 230.

² *Dorrance v. Dorrancetown Borough*, 181 Pennsylvania Reports, 164 (1897).

³ Acts of April 13, 1843, P. L. 218; April 5, 1844, P. L. 200; March 26, 1846, P. L. 175; April 15, 1857, P. L. 205. See Act of July 2, 1901, P. L. 607, § 2.

ing private property for public use. The Act of June 13, 1874,¹ is intended to carry this provision into effect, where no sufficient provision for a jury trial already existed. Counties and townships having been held not to be municipal corporations within the Act of 1874, it was provided by the Act of May 26, 1891,² that an appeal might be taken to the common pleas by any party aggrieved by the decree of any court of quarter sessions, confirming the report of viewers appointed to assess damages for the opening, condemning or change of grade of any street, road or highway, for a trial of the question of damages by a jury according to the course of common law.

As to damages, an allusion has been made to the effect of the six per cent allowance for roads in original grants by the proprietors or the commonwealth. The constitution of 1790 contained no restriction on the taking of private property for public use except that in Article IX, § 10, it was provided that no man's property should be taken or applied to public use "without just compensation."³ A similar provision was contained in the constitution of 1838 and is embodied in the bill of rights to the constitution of 1874 (Article I, § 10). Besides this, Article VII, § 4, of the constitution of 1838 provided that the legislature should not invest any corporate body or individual with the privilege of taking private property for public use, without requiring compensation to be made or secured to the owner of such property. Under this clause it was held that there was no liability for consequential injuries.⁴ To remedy this

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¹ P. L. 283.

² P. L. 116; *Pusey's Appeal*, 83 Pennsylvania Reports, 67 (1877).

³ Pepper and Lewis's Digest of Decisions, Vol. 18, col. 31570.

⁴ *O'Connor v. Pittsburg*, 18 Pennsylvania Reports, 187 (1851).

the constitution of 1874, in Article XVI, § 8, added "injured and destroyed" to the words "property taken," and compensation may now be recovered in the case of any property sufficiently near the improvement to make the injury proximate, immediate and substantial.¹

In assessing damages in road cases, the measure of damages, stated in the briefest possible terms, is the difference in the market value of the property injured before and after the improvement. Into this labyrinth, externally so fair, it would be inadvisable to penetrate, except to remark that, as a practical question, it is extremely difficult to obtain expert witnesses with sufficient powers of generalization to state a difference in market values, as a psychic phenomenon or unrelated idea, without betraying on cross examination the inadmissible sources from which their estimates are derived.

In response to the demand for good roads, which of late years has become more insistent, recent legislation has been directed to the improvement of the condition of the public highways throughout the state. A beginning was made in the Act of June 26, 1895,² which authorized the county commissioners with the approval of the grand jury and court of quarter sessions, to cause any particular main highway to be improved, and for that purpose to re-locate, open, straighten, widen or alter the same, the damage to property to be assessed by viewers. The highway when so improved is a township or borough road, the duty of maintaining which rests on the locality. By an amendment of April 22, 1905,³ the county commissioners are required first to cause to be laid out, surveyed and adopted a system of main thoroughfares, taking into consideration

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¹ *Mellor v. Philadelphia*, 160 Pennsylvania Reports, 614 (1894); *Melon Street*, 182 Pennsylvania Reports, 397 (1897).

² P. L. 336.

³ P. L. 290, since amended by the Act of May 13, 1909, P. L. 527.

the needs of all parts of the county, a plan of such system is to be approved and recorded and thereafter all applications to the quarter sessions for the improvement of a road under the act are to be restricted to the development of such system.

By the Act of April 15, 1903,¹ a state highway department was established, with a commissioner at its head, who is authorized to co-operate with the counties and townships in the reconstruction and improvement of the principal highways according to the plans adopted by the department, the cost to be apportioned and borne, sixty-six and two thirds per cent by the state, sixteen and two thirds per cent each by the county and township, provided that amount appropriated for state aid shall be apportioned among the counties according to their road mileage. Six million five hundred thousand dollars was appropriated to carry out this act, to be expended during six years, ten per cent of which was to be set aside for the purpose of maintenance where the conditions warranted the affording of state aid for such purposes. All highways constructed or improved under the provisions of this act are to be known as State Highways.

In passing rapidly over our system of road law apologies for the omission of much that is of interest as well as of importance are unnecessary. The subject has reached dimensions that can hardly be contained in a text book of reasonable size. The extraordinary number and variety of the statutes, with the decisions interpreting them, might drive a Bentham to despair, but has caused less inconvenience than might reasonably be expected, for the reason that the bar of the state is an aggregation of county bars, each familiar with the local practice and with few opportunities to test

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¹ P. L. 188, supplied by the Act of May 1, 1905, P. L. 318.

the disadvantages of its own, or the advantages of rival systems. Consequently no bar sentiment in favor of uniformity and simplicity has developed, and while there is no inherent difficulty in drafting a code, or series of codes, which, with the repeal of all local acts, would reduce the subject to order, local prejudices and conservatism would probably oppose such a movement. Minor reforms suggest themselves. The assignment of road cases to the quarter sessions, in accordance with colonial tradition, possesses no advantages, and is contrary to the modern tendency to confine the activities of that court to criminal matters.

As appeals from awards of viewers to the common pleas for a jury trial are the rule rather than the exception, the proceedings should have their inception in the latter court, as in change of grade cases under the Act of 1891. There is no reason why six viewers should be appointed to assess damages for the opening of streets in Philadelphia, when three are sufficient in change of grade cases, except to gladden the hearts and replenish the purses of the additional jurors. The method of presenting testimony as to values by expert witnesses is far from satisfactory, but that difficulty belongs to the law of evidence and is not confined to road cases.

Time may improve our roads and our road laws, but for the present no attorney delighting in the sharp points of the law need mourn for a field for his talents.

Criticism is frequently leveled at the adventitious growth of our law, at its want of system, its atavistic tendencies. But is this not true of other sciences as well? Can we not detect traces of folklore in religion, of magic in medicine? The deeper the foundations of a science the more securely is it buttressed by the rubbish of the ages.

Communities do not grow according to preconceived plans, nor does progress necessarily point to a prison

lockstep march toward a utopia of automatic activities. But in law, as in other sciences, there must be periodic revision of the accumulated material, otherwise the principles of social conduct will be lost sight of in a mass of unrelated and arbitrary rules. Statutes that are obsolete should be repealed, conflicting statutes reconciled, and ambiguous statutes restated. Local and special provisions that really serve no useful purpose should, in the interest of orderly administration, be replaced by general acts.

The present state of the statute book, representing as it does the accumulations of two centuries, is far from creditable to a community that claims to be progressive, and should be subjected to systematic revision, if only for the sake of clearness. The responsibility for this condition does not rest wholly upon the bar nor, in fact, upon any one class in the community. It results from the rapidity of our material development and the recurring necessity for immediate legislation, coupled with a fallacious belief in new statutes as a panacea for all the ills of the state. The disinclination to revise what has already been enacted is in part the result of an inherited conservatism, an unwillingness to tamper with what is written although imperfectly understood. Purely selfish interests, too, may unite to disfigure or destroy a well conceived plan for the unification of a branch of the statute law, as happened at the legislative session of 1909 when the proposed school law was cut to pieces to satisfy conflicting local claims.

Since the days of Bradford and Franklin the commonwealth has relied on private enterprise for compilations and digests of the statute law. But these, however creditable to their editors, cannot take the place of a systematic revision authorized by the state and ratified by legislative enactment. The private editor cannot say that any law is obsolete, he must print what he finds.

If he undertakes to decide that an act is repealed or supplied by implication and omits it from his text, there is no assurance that his opinion will be endorsed by the courts.

While road law, owing to its local development, is a glaring example of the confusion that in time creeps into the statute book, it is by no means the only title that requires attention. The laws relating to corporations, municipalities, taxation, as well as other subjects, are in need of revision and unification. The education of the public to the economy of well drafted and properly classified statutes may be slow, but a progressive bar should assist in that education and be prepared to lend encouragement to any reasonable and practical plan for a systematic analysis and rearrangement of our statute law.

APPENDIX.

ARTICLE V OF THE CONSTITUTION OF PENNSYLVANIA.

In effect January 1, 1874.

THE JUDICIARY.

The Courts.

Section 1. The judicial power of this Commonwealth shall be vested in a Supreme Court, in courts of Common Pleas, courts of oyer and terminer and general jail delivery, courts of quarter sessions of the peace, orphans' courts, magistrates' courts, and in such other courts as the General Assembly may from time to time establish.

Supreme Court—Tenure of Judges—Chief Justice.

Section 2. The Supreme Court shall consist of seven judges who shall be elected by the qualified electors of the State at large. They shall hold their offices for the term of twenty-one years, if they so long behave themselves well, but shall not be again eligible. The judge whose commission shall first expire shall be chief justice, and thereafter each judge whose commission shall first expire shall in turn be chief justice.

Supreme Court.

Section 3. The jurisdiction of the Supreme Court shall extend over the State, and the judges thereof shall, by virtue of their offices, be justices of oyer and terminer and general jail delivery in the several counties; they shall have original jurisdiction in cases of injunction where a corporation is a party defendant, of habeas corpus, of mandamus to courts of inferior jurisdiction, and of quo warranto as to all officers of the Commonwealth whose jurisdiction extends over the State, but shall not exercise any other original jurisdiction; they shall have appellate jurisdiction by appeal, certiorari or writ of error in all cases, as is now or may hereafter be provided by law.

Common Pleas Courts.

Section 4. Until otherwise directed by law, the courts of common pleas shall continue as at present established, except

as herein changed; not more than four counties shall, at any time, be included in one judicial district organized for said courts.

Judicial Districts—Associate Judges.

Section 5. Whenever a county shall contain forty thousand inhabitants it shall constitute a separate judicial district, and shall elect one judge learned in the law; and the General Assembly shall provide for additional judges, as the business of the said districts may require. Counties containing a population less than is sufficient to constitute separate districts shall be formed into convenient single districts, or, if necessary, may be attached to contiguous districts as the General Assembly may provide. The office of associate judge, not learned in the law, is abolished in counties forming separate districts; but the several associate judges in office when this Constitution shall be adopted shall serve for their unexpired terms.

Common Pleas Courts in Philadelphia and Allegheny Counties.

Section 6. In the counties of Philadelphia and Allegheny all the jurisdiction and powers now vested in the district courts and courts of common pleas, subject to such changes as may be made by this Constitution or by law, shall be in Philadelphia vested in four, and in Allegheny in two, distinct and separate courts of equal and co-ordinate jurisdiction, composed of three judges each; the said courts in Philadelphia shall be designated respectively as the court of common pleas number one, number two, number three and number four, and in Allegheny as the court of common pleas number one and number two, but the number of said courts may be by law increased, from time to time, and shall be in like manner designated by successive numbers; the number of judges in any of said courts, or in any county where the establishment of an additional court may be authorized by law, may be increased from time to time, and whenever such increase shall amount in the whole to three, such three judges shall compose a distinct and separate court as aforesaid, which shall be numbered as aforesaid. In Philadelphia all suits shall be instituted in the said courts of common pleas without designating the number of said court, and the several courts shall distribute and apportion the business among them in such manner as shall be provided by rules of court, and each court, to which any suit shall be thus assigned, shall have exclusive jurisdiction thereof, subject to change of venue, as

shall be provided by law. In Allegheny each court shall have exclusive jurisdiction of all proceedings at law and in equity, commenced therein, subject to change of venue as may be provided by law.

Prothonotary of Philadelphia—Court Dockets.

Section 7. For Philadelphia there shall be one prothonotary's office, and one prothonotary for all said courts to be appointed by the judges of said courts, and to hold office for three years, subject to removal by a majority of the said judges; the said prothonotary shall appoint such assistants as may be necessary and authorized by said courts; and he and his assistants shall receive fixed salaries, to be determined by law and paid by said county; all fees collected in said office, except such as may be by law due to the Commonwealth, shall be paid by the prothonotary into the county treasury. Each court shall have its separate dockets, except the judgment docket which shall contain the judgments and liens of all the said courts, as is or may be directed by law.

Criminal Courts in Philadelphia and Allegheny Counties.

Section 8. The said courts in the counties of Philadelphia and Allegheny, respectively, shall, from time to time, in turn detail one or more of their judges to hold the courts of oyer and terminer and the courts of quarter sessions of the peace of said counties, in such manner as may be directed by law.

Common Pleas Judges to be Justices of the Peace.

Section 9. Judges of the courts of common pleas learned in the law shall be judges of the courts of oyer and terminer, quarter sessions of the peace and general jail delivery, and of the orphans' court, and within their respective districts shall be justices of the peace as to criminal matters.

Judges of Common Pleas Courts may Issue Writs of Certiorari.

Section 10. The judges of the courts of common pleas, within their respective counties, shall have power to issue writs of *certiorari* to justices of the peace and other inferior courts not of record, and to cause their proceedings to be brought before them, and right and justice to be done.

Justices of the Peace and Aldermen.

Section 11. Except as otherwise provided in this Constitution, justices of the peace or aldermen shall be elected in the several wards, districts, boroughs and townships at the time of the election of constables by the qualified electors thereof, in such manner as shall be directed by law, and shall be commissioned by the Governor for a term of five years. No township, ward, district or borough shall elect more than two justices of the peace or aldermen without the consent of a majority of the qualified electors within such township, ward or borough; no person shall be elected to such office unless he shall have resided within the township, borough, ward or district for one year next preceding his election. In cities containing over fifty thousand inhabitants, not more than one alderman shall be elected in each ward or district.

Magistrates in Philadelphia.

Section 12. In Philadelphia there shall be established, for each thirty thousand inhabitants, one court, not of record, of police and civil causes, with jurisdiction not exceeding one hundred dollars; such courts shall be held by magistrates whose term of office shall be five years, and they shall be elected on general ticket by the qualified voters at large; and in the election of the said magistrates no voter shall vote for more than two-thirds of the number of persons to be elected when more than one are to be chosen; they shall be compensated only by fixed salaries, to be paid by said county; and shall exercise such jurisdiction, civil and criminal, except as herein provided, as is now exercised by aldermen, subject to such changes, not involving an increase of civil jurisdiction or conferring political duties, as may be made by law. In Philadelphia the office of alderman is abolished.

Fees, Fines and Penalties.

Section 13. All fees, fines and penalties in said courts shall be paid into the county treasury.

Appeals from Summary Convictions.

Section 14. In all cases of summary conviction in this Commonwealth, or of judgment in suit for a penalty before a magistrate, or court not of record, either party may appeal to such

court of record as may be prescribed by law, upon allowance of the appellate court or judge thereof upon cause shown.

Election of Judges—Removal.

Section 15. All judges required to be learned in the law, except the judges of the Supreme Court, shall be elected by the qualified electors of the respective districts over which they are to preside, and shall hold their offices for the period of ten years, if they shall so long behave themselves well; but for any reasonable cause, which shall not be sufficient ground for impeachment, the Governor may remove any of them on the address of two-thirds of each House of the General Assembly.

Voting for Judge of Supreme Court.

Section 16. Whenever two judges of the Supreme Court are to be chosen for the same term of service each voter shall vote for one only, and when three are to be chosen he shall vote for no more than two; candidates highest in vote shall be declared elected.

Priority of Judges' Commissions.

Section 17. Should any two or more judges of the Supreme Court, or any two or more judges of the court of common pleas for the same district, be elected at the same time, they shall, as soon after the election as convenient, cast lots for priority of commission, and certify the result to the Governor, who shall issue their commissions in accordance therewith.

Compensation of Judges.

Section 18. The judges of the Supreme Court and the judges of the several courts of common pleas, and all other judges required to be learned in the law, shall at stated times receive for their services an adequate compensation, which shall be fixed by law, and paid by the State. They shall receive no other compensation, fees or perquisites of office for their services from any source, nor hold any other office of profit under the United States, this State or any other State.

Residences of Judges.

Section 19. The judges of the Supreme Court, during their continuance in office, shall reside within this Commonwealth; and the other judges, during their continuance in office shall

reside within the district for which they shall be respectively elected.

Chancery Powers of Common Pleas Courts.

Section 20. The several courts of common pleas, besides the powers herein conferred, shall have and exercise within their respective districts, subject to such changes as may be made by law, such chancery powers as are now vested by law in the several courts of common pleas of this Commonwealth, or as may hereafter be conferred upon them by law.

Supreme Court—Extra Judicial Duties—Court of Nisi Prius Abolished.

Section 21. No duties shall be imposed by law upon the Supreme Court or any of the judges thereof except such as are judicial, nor shall any of the judges thereof exercise any power of appointment except as herein provided. The court of *nisi prius* is hereby abolished, and no court of original jurisdiction to be presided over by any one or more of the judges of the Supreme Court shall be established.

Orphans' Courts—Auditing of Accounts—Registers' Courts Abolished.

Section 22. In every county wherein the population shall exceed one hundred and fifty thousand the General Assembly shall, and in any other county may, establish a separate orphans' court to consist of one or more judges who shall be learned in the law, which court shall exercise all the jurisdiction and powers now vested in or which may hereafter be conferred upon the orphans' courts, and thereupon the jurisdiction of the judges of the court of common pleas within such county, in orphans' court proceedings, shall cease and determine. In any county in which a separate orphans' court shall be established, the register of wills shall be clerk of such court and subject to its directions in all matters pertaining to his office; he may appoint assistant clerks, but only with the consent and approval of said court. All accounts filed with him as register or as clerk of the said separate orphans' court shall be audited by the court without expense to parties, except where all parties in interest in a pending proceeding shall nominate an auditor whom the court may, in its discretion, appoint. In every

county orphans' courts shall possess all the powers and jurisdiction of a registers' court, and separate registers' courts are hereby abolished.

Style of Process.

Section 23. The style of all process shall be "The Commonwealth of Pennsylvania." All prosecutions shall be carried on in the name and by the authority of the Commonwealth of Pennsylvania, and conclude "against the peace and dignity of the same."

Right of Appeal in Criminal Cases.

Section 24. In all cases of felonious homicide, and in such other criminal cases as may be provided for by law, the accused after conviction and sentence may remove the indictment, record and all proceedings to the Supreme Court for review.

Vacancies in Court—How Filled.

Section 25. Any vacancy happening by death, resignation or otherwise, in any court of record, shall be filled by appointment by the Governor, to continue till the first Monday of January next succeeding the first general election which shall occur three or more months after the happening of such vacancy.

Laws Relating to Courts to be Uniform—Special Courts Forbidden.

Section 26. All laws relating to courts shall be general and of uniform operation, and the organization, jurisdiction and powers of all courts of the same class or grade, so far as regulated by law, and the force and effect of the process and judgments of such courts, shall be uniform; and the General Assembly is hereby prohibited from creating other courts to exercise the powers vested by this Constitution in the judges of the courts of common pleas and orphans' courts.

Submission of Issues of Fact.

Section 27. The parties, by agreement filed, may in any civil case dispense with trial by jury, and submit the decision of such case to the court having jurisdiction thereof, and such court shall hear and determine the same; and the judgment thereon shall be subject to writ of error as in other cases.

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